No. 91-1155

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In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,

Petitioners,

v.

WALTER LEE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the solicitation of contributions for a religious cause may be prohibited from the public concourses of the New York City airports.

2. Whether the Court of Appeals for the Second Circuit erred in finding, in conflict with decisions of the District of Columbia, Fifth, Seventh, Eighth, and Ninth Circuits, that public corridors of airports are not "public forums" presumptively available for free speech, including solicitation of contributions for religious groups.

3. Whether the public areas of airports, the counterpart of a city's gates, should be closed to the full panoply of expression, so as to insulate the travelling public from speech that, at worst, might cause them momentary delay and, at best, cause people to think, to support political or religious causes, or to change their views.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The International Society for Krishna Consciousness, Inc., and Brian Rumbaugh petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 925 F.2d 576. The opinion and order of the district court, App. 29, is reported at 721 F. Supp. 572. The Magistrate's Report and Recommendation, App. 49, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1991, and a petition for rehearing was denied and suggestion for rehearing en banc declined on April 25, 1991. App. 74. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

1. The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. The Fourteenth Amendment to the United States Constitution, section 1, provides, in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

3. Chapter III, Part B Rules and Regulations of the Port Authority of New York and New Jersey, as amended, provides, in part, as follows:

> B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.[1]

STATEMENT

The petitioners, the International Society for Krishna Consciousness, Inc., a not-for-profit New York

[1] The full text of the Regulation is set forth at App. 78.

corporation,[2] and Brian Rumbaugh (collectively ISKCON), one of its members, espouse the theological and missionary views of the Krishna Consciousness religion, "an outgrowth of the Chaitanya movement of Bengal." *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 433 (2d Cir. 1981). Krishna Consciousness was brought to America in 1965 by His Divine Grace A.C. Bhaktivedanta Swami Prabhupada (Srila Prabhupada), a scholar and teacher who translated and wrote over 100 books, including a translation and edition of the *Bhagavad-gita*, the 25-volume *Srimad Bhagavatam*, and 17 volumes of *Sri Caitanya Caritamrta*.

In accordance with the central importance of scripture to the religion, Srila Prabhupada instructed his disciples to disseminate the written teachings as widely as possible. Thus, devotees are required to venture into public places for the purposes of chanting the names of God, proselytizing members of the public, distributing religious literature, and soliciting support for the religion. Called *sankirtan* in Sanskrit, this activity lies at the core of Krishna Consciousness and is its very lifeblood.

At the time this lawsuit was filed, the respondent, Walter Lee, was the Superintendent of the Port Authority of New York and New Jersey (Port Authority) Police, the official charged with enforcement of airport regulations.[3] The Port Authority itself was created in 1921 by interstate

[2] ISKCON has no parent or subsidiary.

[3] Mr. Lee has since died. An acting superintendent, Charles E. Newman, is presently serving. Since a permanent replacement has not been appointed, petitioners continue to designate Mr. Lee as the respondent. *See* Sup. Ct. R. 35.3.

compact, N.Y. Unconsol. Laws §§ 6401-6423 (McKinney 1979 & Supp. 1991); N.J. Stat. Ann. §§ 32:1-1 to -24 (West 1990 & Supp. 1991), and is operated for the benefit of the people of the two states, N.Y. Unconsol. Laws § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35.4 (West 1990). Among its other functions, the Port Authority operates John F. Kennedy (JFK), La Guardia and Newark Airports under long-term ground leases with the states of New York and New Jersey, which own the airports.

All three airports contain many and varied public facilities, much like a self-contained city. The airports encompass restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, bookstores, newsstands, seating areas, advertising displays, public information stations, dental offices, private clubs – even a branch of Bloomingdale's. *See* Joint Appendix 224-25 (Newark), 225-26 (JFK), 231-32 (La Guardia).[4]

The three New York area airports make up the busiest airport complex in the world. Supplemental Appendix 96.[5] In 1986, the airports served 78,846,000 passengers – 7.8 percent of the entire domestic market, and 54.4 percent of the trans-Atlantic market. SA 54. By the end of the

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[4] Joint Appendix (hereinafter JA) refers to the Joint Appendix filed in the court of appeals.

[5] Supplemental Appendix (hereinafter SA) refers to the Supplemental Appendix filed in the court of appeals.

century, this number is expected to increase to more than 110 million passengers a year, *id.*, a figure which does not include "meeters and greeters."

The action was filed on October 25, 1975. On the same day, ISKCON sought a temporary restraining order and a preliminary injunction against enforcement of Port Authority regulations, N.Y. Admin. Code tit. 21, §§ 1260.13-.15 (1973), that required a license as a condition of the exercise of speech at the three airports. On January 19, 1976, the Port Authority and then Superintendent Lee filed a motion to dismiss, which, together with plaintiffs' motion for preliminary injunction, was heard on February 20, 1976, and decided on January 14, 1977. *International Soc'y for Krishna Consciousness v. New York Port Auth.*, 425 F. Supp. 681 (S.D.N.Y. 1977).

Judge Carter held Mr. Lee in as a defendant, but dismissed the Port Authority. The court, although agreeing that the challenged regulations were unconstitutional on their face, *id.* at 687, denied a preliminary injunction, holding that the airlines that leased space from the Port were indispensable parties. *Id.* at 686.

After the airlines were joined, on November 8, 1979, twenty-eight of them moved to dismiss the complaint, claiming that the prohibition of expressive activities in the areas of the airports they leased was not "state action," and ISKCON renewed its request for a preliminary injunction.

On July 23, 1982, Judge Lowe, to whom the case had been transferred, denied both motions. As to the motion to dismiss, the court held that the requisite state action existed. Memorandum Opinion and Order (July 23, 1982)

at 46-55. The court denied the preliminary injunction motion as "moot" on the ground that the Port Authority had stated that the particular regulations challenged did not apply to non-commercial activity. *Id.* at 58.

On April 20, 1983, the district court certified pursuant to 28 U.S.C. § 1292(b) the airlines' interlocutory appeal of the denial of their motion to dismiss. The court of appeals granted leave to appeal, but, after argument, vacated the permission and remanded the case with instructions that "gaps" in the "record" be filled. *International Soc'y for Krishna Consciousness v. Air Can.*, 727 F.2d 253, 255 (2d Cir. 1984).

Following discovery, the airlines again moved to dismiss. On June 1, 1987, Magistrate Dolinger filed a Report and Recommendation again concluding that the motions should be denied.

On November 11, 1987, plaintiffs moved for summary judgment, or, in the alternative, for a preliminary injunction, on both the state action and public forum issues. The airlines entered into a settlement agreement with which they were dismissed from the case, mooting the state action question. *See* JA 319-20.

The Port Authority, however, continued to claim the right to prohibit the distribution of religious literature and solicitation of donations in the terminal areas under its exclusive control. On February 11, 1988, the Port Authority promulgated a resolution codifying this policy. Under the regulation, the "continuous or repetitive" sale or distribution of literature and solicitation of donations is prohibited in the terminals. App. 84.

Arguments were presented before Magistrate Dolinger on March 25, 1988. Based upon the Port's representation that during the litigation plaintiffs would be permitted to continue the distribution of religious literature and solicitation of donations in the interior terminal areas, *see* JA 283, plaintiffs conditionally withdrew their request for preliminary injunction. *Id.* at 21, JA 298.

On October 25, 1988, Magistrate Dolinger recommended that ISKCON's motion for summary judgment be granted. The magistrate held that petitioners "are entitled to a declaration that the general circulation areas of the passenger terminals directly controlled by the Port Authority at the JFK International, La Guardia, and Newark International Airports are public fora, and that a total prohibition against leafletting and solicitation within these buildings is inconsistent with the requirements of the first amendment." App. 72. The magistrate found that the

> interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors "lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please." . . . Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

App. 70-71 (quoting *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988)).

The Port Authority objected to the Magistrate's Report. JA 354. On September 15, 1989, the district court issued an Order and Opinion adopting the magistrate's recommendation and granting summary judgment for petitioners. Applying *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the court found the general circulation areas of the airport terminals to "possess the characteristics of a bustling metropolitan boulevard," App. 40, 721 F. Supp. at 576, and to be "the functional equivalent of public streets." App. 41, 721 F. Supp. at 577. The court agreed that "the airports' character, pattern of activity and nature of purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family." App. 47, 721 F. Supp. at 579.

The court of appeals affirmed in part and reversed in part. Although the divided panel noted that it had initially been inclined to affirm the judgment in its entirety, it concluded that the intervening opinion in *United States v. Kokinda*, 110 S. Ct. 3115 (1990) (No. 88-2031), had "altered public forum analysis." App. 10, 925 F.2d at 580.

The majority believed that "[u]ntil *Kokinda*," streets and sidewalks were treated as traditional public fora without a "detailed analysis of their particular purposes."[6] App. 11, 925 F.2d at 580. *Kokinda*, the court thought, wrought a sea-change, under which a forum's "purpose" is dispositive. App. 13-14, 925 F.2d at 582. It

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[6] "Given this approach," the court found "the district court's reliance on the visual and other similarities between the terminals' passageways and a 'bustling metropolitan boulevard' . . . understandable." App. 11, 925 F.2d at 581.

read *Kokinda* as entailing that when the "particular purpose of a place" is such that "the public uses [it] as a matter of necessity, or at least great convenience," the "in-person solicitation of funds" may be banned. *Id.* The court, however, counted at least five *Kokinda* votes as requiring that in-person literature distribution be allowed in the same place. *Id.* It accordingly reversed "insofar as the district court invalidated the Port Authority's ban on the in-person solicitation of funds but affirm[ed] insofar as it invalidated the Port Authority's ban on the distribution of literature." App. 3, 925 F.2d at 577.

Chief Judge Oakes dissented because he "believe[ed] that *Kokinda* is neither controlling nor a substantial deviation from the Court's public forum analysis." App. 17, 925 F.2d at 583. While recognizing that "the purposes of a forum are highly relevant to the traditional public forum inquiry," App. 18, 925 F.2d at 583, he asserted "that a forum's purpose alone can[not] dictate its status." *Id.* According to the dissent, if this were the case, then "[v]irtually all Government owned property" that "has an ostensible 'purpose' other than the promotion of free speech, assembly, and debate," *id.* would be unavailable for the exercise of First Amendment rights. Public forum analysis, the dissent maintained, turns not solely upon a forum's purpose, but rather upon a myriad of factors, all discussed in *Kokinda*, including the forum's location, the degree of access which the public has to the forum, and whether the forum in question has traditionally been used for expressive purposes. App. 20, 925 F.2d at 584. Applying these factors, Judge Oakes would have found the airport terminals to be "traditional public fora." App. 26, 925 F.2d at 586.

Three judges dissented from the denial of rehearing en banc. *See* App. 75, 925 F.2d at 587 (opinion of Oakes, C.J., joined by Newman & Cardamone, J.J.). The dissenters wished, first, to avoid a circuit conflict; second, "to clarify our court's understanding" of *Kokinda*; and third, "to reconsider the panel's conclusion that a forum's purpose alone can determine its public or non-public forum status." App. 75-76, 925 F.2d at 587. "[T]hat the Supreme Court is sure to grant certiorari," was not, for the dissenters, a sufficient basis on which to deny rehearing before the full circuit bench. App. 77, 925 F.2d at 588.

REASONS FOR GRANTING THE PETITION

When filed in 1975, this case was one of just a trickle of challenges to governmental restrictions on First Amendment activities in airport terminals. By the time it was decided on appeal sixteen years later, the status of airport terminals as a public forum was one of the most profusely litigated issues in the annals of public forum jurisprudence – resulting in near-universal recognition that First Amendment activities must be permitted in such facilities.[7]

[7] Reported court of appeals decisions include *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *International Soc'y for Krishna Consciousness v. Rochford*, 508 F.2d 263 (7th Cir. 1978); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th

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The court of appeals was initially inclined to follow this "unusual consensus of judicial, legislative, and administrative opinion." *U.S. S.W. Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983).[8] The court believed, however, that *Kokinda* required a dramatic departure from this otherwise settled law.

This Court has granted review of the airport public forum issue once before, although it was not necessary to decide, *see Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), and at least two members of the Court felt at that time that the issue "should not have [been] postponed . . . for another day." *Id.* at 577 (White, J., joined by Rehnquist, C.J., concurring).

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Cir. 1981); *U.S. S.W. African/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986), *aff'd*, 482 U.S. 569 (1987); *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

Reported district court opinions include *International Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977); *International Soc'y for Krishna Consciousness v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977); *International Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1007 (S.D. Tex. 1977); *International Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. La. 1978); *International Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869 (E.D. Wis. 1978).

[8] The Federal Aviation Administration, in promulgating regulations for solicitation and literature distribution at National and Dulles Airports, *see* 14 C.F.R. §§ 159.93-.94 (1991), recognized that the airports' concourses and walkways are "in many respects . . . like another public thoroughfare," 45 Fed. Reg. 34,314 (1980).

The status of airport terminals as public fora is an issue with far-reaching constitutional implications. Apart from the sharp legal and logistical conflict created amongst the circuits on the airport issue, expressive rights at other places deemed analogous to urban streets, parks and sidewalks may also be affected by the court of appeals' approach. These facilities include urban bus terminals,[9] public buildings,[10] national monuments,[11] public stadia,[12] and highway rest areas.[13]

Review is necessary also to clarify the court of appeals' interpretation of *Kokinda*. Contrary to the court of appeals' suggestion, public forum analysis is neither stagnant nor dogmatic; rather, it is diverse and evolving, and relies not upon a single, dispositive factor, such as "purpose," but upon a variety of relevant factors which ensure that the expression of views is not restricted to such inordinately expensive mediums as television and newspapers, but remain accessible to citizens of all

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[9] *See, e.g. Wolin v. Port of N. Y. Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

[10] *See, e.g., United States v. Boeswetter*, 463 F. Supp. 370 (D.C.D.C. 1978); *International Soc'y for Krishna Consciousness v. McAvey*, 450 F. Supp. 1265 (S.D.N.Y. 1978); *International Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714 (N.D. Tex. 1978).

[11] *See, e.g. United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979).

[12] *See, e.g. Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991).

[13] *See, e.g. International Soc'y for Krishna Consciousness v. Hays*, 438 F. Supp. 1077 (S.D. Fla. 1977).

political and religious persuasions and economic and social strata.

I. THE COURT OF APPEALS' DECISION HAS CREATED A CLEAR-CUT CONFLICT IN THE COURTS OF APPEALS OVER THE IMPORTANT QUESTION WHETHER AIRPORT TERMINALS ARE A PUBLIC FORUM.

As the panel majority noted, "[t]he 'well-established' authority in other circuits . . . is that airport terminals are traditional public fora for speech activites." App. 10, 925 F.2d at 580. It forthrightly recognized that its decision "creat[ed] . . . a circuit conflict" over the "considerable weight of unanimous authority." *Id.* The three judges who dissented from the denial of rehearing en banc agreed, urging that "rehearing is necessary to avoid a clear-cut conflict. . . . " App. 75, 925 F.2d at 587.

The observations of all the judges below who looked at the question are of course correct. The Eighth Circuit, for example, reported in 1987 that "every court that has decided the issue has held that an airport is a public forum," *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).[14]

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[14] A later, unreviewed district court case, *International Caucus of Labor Committees v. Metropolitan Dade County, Fla.*, 724 F. Supp. 917 (S.D. Fla. 1989), although labeling Miami International Airport "a nonpublic forum," *id.* at 925, did not have occasion to consider a complete ban on a protected form of expression. Rather, the airport sought only to regulate First Amendment activities through time, place and manner regulations such as "designated first amendment areas," and the "use

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In *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975), for example, the court observed that O'Hare Airport's "spacious, city-owned common areas . . . resemble those public thoroughfares which have long been recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information." *Id.* at 925.

Similarly, in holding the interior terminal areas of the Dallas/Fort Worth Airport to be a public forum, the court in *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. Unit A. Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982), found "[t]he parallel between public streets and the crescent-shaped concourses of the D/FW terminal buildings, where air travellers as well as the general public may shop, drink, imbibe, and sightsee," to be "clear and powerful." *Id.* at 627.

In *U.S. S.W. Africa/Namibia Trade & Cultural Council v. United States*, the court commented that the open areas of National and Dulles airports resembled a "fair-sized municipality," 708 F.2d at 764, where "[r]oughly eighteen million people pass through the concourses and walkways each year, enjoying the benefits of restaurants and snack bars, two post offices, various specialty shops, two medical stations, at least five bars, a barber shop, drug stores, banks, newsstands, and police stations." *Id.* The

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of tables and semi-fixed signs *in* the first amendment zones," *id.* at 919 (emphasis added). The court emphasized that a ban on expression was "a far cry" from the regulations before it. *Id.* at 930.

court thus concluded that "the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases." *Id.*

The two most recent circuit court decisions[15] have reached identical results. The Ninth Circuit concurred with the reasoning in *Chicago Area Military Project* in finding Los Angeles airport to be a "public thoroughfare." *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 784 F.2d 791, 794 (9th Cir. 1986), *aff'd*, 482 U.S. 569 (1987). And, the Eighth Circuit

> agree[d] . . . that the concourse of a large airport facility like the one in St. Louis has the character, pattern of activity, and nature of purpose that make it an appropriate place for the communication of views. *See Wolin*, 392 F.2d at 89. As has been noted, an airport terminal is much like a busy city street. Both are lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please.

Jamison, 828 F.2d at 1283.

The judicial recognition that transportation terminals are public thoroughfares appropriate for expression did not begin with airports. One of the earlier cases had no difficulty concluding that Union Station in Los Angeles, "a spacious area open to the community as a center for a rail transportation," is "like a public street or park." *In re*

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[15] Both decisions post-date this Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

Hoffman, 67 Cal.2d 845, 847, 851, 434 P.2d 353, 354, 356, 64 Cal. Rptr. 97, 98, 100 (1967).

Similarly, in holding the concourses of the Port Authority bus terminal in Manhattan an appropriate place for the exercise of First Amendment rights, the court in *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968), observed that

> the character and function of the Terminal, makes clear that it is a thoroughfare used by thousands of people each day. It is one of the busiest passageways in the country, with persons hurrying to and from subways, buses, shops, theaters, and other streets. In design and physical appearance, the main concourse resembles a street. The fifty foot walk is lined with stores and concessionaires, crowded at some hours and less dense at others . . . The terminal, with its many adjuncts, becomes something of a small city – but built indoors.

Id. at 89.

The five courts of appeals and numerous other courts that have held airport terminals to be public fora have recognized the essential role these facilities play in the lives of the communities which they serve, and in the national and international circulation of people, goods, and ideas. The petition should be granted to reaffirm that the right to speak in these places may not be broadly denied.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED TO CLARIFY THE IMPACT OF *KOKINDA* ON PUBLIC FORUM ANALYSIS.

Certiorari should also be granted so that the Court can clarify its recent holding in *Kokinda*. The majority below believed that *Kokinda* "has altered public forum analysis" by shifting the focus from a fact-intensive approach to one based exclusively on the "purpose" of a particular facility. While Justice O'Connor, writing for the plurality in *Kokinda*, said that "[t]he mere physical characteristics of the property cannot dictate forum analysis," 110 S. Ct. at 3120, the Court also gave considerable weight to the particular physical characteristics of the post office sidewalks at issue. They did "not have the characteristics of public sidewalks traditionally open to expressive activities" *id*, and were "not . . . a thoroughfare." *Id.*

Here, in contrast, airport terminals are clearly public thoroughfares, "an interface between modes of transportation, a medium from ground to air." E. Blankenship, *The Airport* 28 (1974) [hereinafter Blankenship]. "[B]us and train terminals and airports are the streets of modernity." Note, *Public Forum Analysis After* Perry Education Association v. Perry Local Educators' Association – *A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 Fordham L. Rev. 545, 557 (1986).

Kokinda placed considerable weight on the fact that, in operating a postal service, the government acts in a "proprietory capacity." 110 S. Ct. at 3119. The decision below never considers whether airports are, similarly,

proprietory governmental operations. Although an airport generates revenue for the government, so do some parks and streets. The fact that revenue is generated, or the manner in which a particular facility is funded, should not be sufficient to end further public forum analysis. A post office and a municipal transit system are examples of the government *engaged* in commerce. At an airport, on the other hand, the government does not operate the airlines or the numerous shops, restaurants and other facilities found there. Instead, at an airport, the government merely *aids* commerce, rather than engaging in it. A city's streets and sidewalks serve to facilitate commerce – people use them to get to privately operated businesses.

Similarly, the public portions of an airport serve as an aid to commerce, as a passageway used by the public on their way to airlines and stores. Thus, unlike the postal sidewalk in *Kokinda*, the New York terminals "facilitate the daily commerce and life of the . . . city." *Kokinda*, 110 S.Ct. at 3120.

Justice Kennedy's concurrence also rejects any singular "purpose" test. "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." 110 S. Ct. at 3115 (Kennedy, J., concurring). Thus, while an airport may primarily accommodate a particular class of patrons – air travellers – its *activities* are numerous and varied.

Standard principles of modern airport planning and design recognize this reality, and thus dictate that passenger terminals contain appurtenances and services identical to those in urban commercial areas, including

"lobbies . . . office space, concessions, newsstands, restaurants, and government . . . management facilities." Blankenship at 28. Retail establishments in particular "are currently one of the most active areas of change in the airport facility . . . Products are no longer limited to typical newsstand and fast food items. Gourmet dining, up-scale apparel shops, and specialty foods . . . are becoming commonplace." G. Doughty, *Review of Passenger Service Issues at Airports*, in *Airports for People: Proceedings of the 8th World Airport Conference Organized by the Institution of Civil Engineers* 9 (1988).

The New York airports match this description. The International Arrivals Building at JFK, for example, is "equipped with all the conveniences one expects to find in a modern city." R. Allen, *Great Airports of the World* 73 (1964). Replete with pedestrian walkways, seating areas, bars, restaurants, newsstands, gift shops, a post office, advertising displays, book stores, insurance and car rental outlets, and even a retail Bloomingdale's, the terminal mirrors the immense urban agglomerate which it serves. Thus, a citizen who uses an airport terminal, as one who uses a street or sidewalk, as a forum for the dissemination of religious or political views, is not "making an anomalous use of it"; he or she is not "out of place" nor "out of order." Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 12.

For this reason, Judge Oakes appropriately observed that it is "considerably less than certain that if the post office building in *Kokinda* had also included the vast array of shops, restaurants, and service centers characteristic of Kennedy, La Guardia, and Newark Airports that even four Justices would have found that the sidewalk outside

was not a traditional public forum." App. 24, 925 F.2d at 585.

III. THE COURT OF APPEALS ERRED IN FINDING THAT THE SOLICITATION OF FUNDS, A FULLY PROTECTED FORM OF FIRST AMENDMENT EXPRESSION, COULD BE PROHIBITED BASED ON UNSUBSTANTIATED AND UNJUSTIFIED FEARS OF DISRUPTION.

The Second Circuit approved a ban on face-to-face solicitation because of its supposed disruptive effects. While acknowledging that airports may be

> particularly useful to those seeking to solicit funds . . . when the particular purpose is such that the public uses them as a matter of necessity, or at least great convenience, we read the plurality [*Kokinda*] opinion to allow the prohibition of in-person solicitation of funds to prevent disruption of that public. Justice Kennedy reaches the same result because he believes that a prohibition on the in-person solicitation of funds is a legitimate time, place and manner restriction.

App. 14, 925 F.2d at 582.

The court below did not give sufficient weight to the fact that solicitation of funds "is a recognized form of speech protected by the First Amendment." *Kokinda*, 110 S. Ct. at 3118.[16] This is particularly true when the

[16] "Our prior cases teach that the solicitation of charitable contributions is protected speech." *Riley v. National Federation of the Blind*, 487 U.S. 781, 789 (1988); "Charitable solicitation of funds has been recognized by this court as a form of protected speech." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 797 (1985).

solicitations are conducted "to support speech." *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d 718, 720 (2d Cir. 1984).

In *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) for example, the Court noted that face-to-face encounters for noncommercial donations provide "a greater opportunity for the exchange of ideas and the propagation of views than is available" in other forms of solicitation such as mail appeals. *Id.* at 798. By approaching members of the public one-on-one, ISKCON solicitors have the opportunity to discuss ideas, to give away books, and to solicit donations to support their cause. Thus, ISKCON's efforts are not the mere importuning of members of the public to give aid, but a reasoned discussion that includes a request for support.

No doubt, "a religous organization needs funds to remain a going concern." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). ISKCON members do not sell their literature[17] for a fixed price, nor is there a direct relationship between the cost of the book and the donation received. It is obvious, however, that petitioners must buy the books they distribute. The court of appeals' opinion allowing the distribution of literature, but prohibiting the solicitation of donations, deprives petitioners of the very resources necessary to pay for the books which they distribute.

There is also no basis for the fear that the airport "facility might be disrupted by such solicitation." App.

[17] ISKCON members primarily distribute religious books as opposed to leaflets or handbills.

14, 925 F.2d at 582. Petitioners have repeatedly made clear that they do not seek access to "any private offices, ticket counters or lines, check-in areas, baggage claims areas or lines, or exclusively leased waiting areas. . . . On the contrary, ISKCON members seek to conduct their activities *only* in areas of general circulation, including corridors, lobbies, and areas which are bordered by shops, restaurants, lounges and other commercial establishments unrelated to air transportation." Declaration of Brian Rumbaugh In Opposition To Defendants' Motion To Dismiss ¶ 6, at 4 (Aug. 14, 1985); JA 155. Thus, in the sixteen years that this case has been pending, respondents have yet to report a single instance of a traveller missing a flight, failing to make arrangements for ticketing or ground transportation, or missing a meeting or appointment because of petitioners' activities.

It simply cannot be shown, therefore, that face-to-face solicitations of donations in the general circulation areas of an airport terminal are disruptive of airport operations. The Port Authority regulations do not prohibit proselytizing or speechmaking, which might attract crowds and disrupt pedestrian traffic flow as much as a person making a donation to a colporteur. Literature distribution, permitted under the court of appeals' decision, might well be as disruptive to a traveller "hurrying to catch a plane or to arrange ground transportation" App. 14, 925 F.2d at 582, as a request for a voluntary donation. All entail some ephemeral degree of inconvenience to the traveller which is properly addressed not by a total ban on all First Amendment activities in an otherwise appropriate forum, but by the implementation of

reasonable time, place and manner regulations,[18] such as those that have worked flawlessly in the New York airports for the last sixteen years.

The Port Authority's "undifferentiated fear or apprehension" *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969) of pedestrian traffic congestion, therefore, "is not enough to overcome the right to freedom of expression" *id.*, and is not relevant to public forum analysis.

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[18] *See, e.g., Fernandes*, 663 F.2d at 626 ("That the passageways are crowded does not defeat this conclusion [that the terminals are a public forum]; rather, such factors go to the reasonableness of the time, place, and manner restrictions imposed on persons exercising First Amendment rights in the forum."); *Wolke*, 453 F. Supp. at 874 ("Crowded conditions may require restrictions to ensure the efficient operation of the airport. But the conditions cannot support the sweeping prohibitions of free speech implicit in finding that the airport is not a public forum."); *cf. Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding "booth rule" in Minnesota State Fairgrounds as time, place and manner regulation to control, in large part, pedestrian congestion); *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979) (upholding "booth rule" in Atlanta airport as place and manner regulation to control pedestrian traffic congestion).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 24, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1082 – August Term, 1989
(Argued: March 27, 1990 Decided: February 8, 1991)
Docket No. 89-9182

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and JOHN WINSLOW, on behalf of themselves and all International Society for Krishna Consciousness members,

Plaintiffs-Appellees,

-v.-

WALTER LEE, Superintendent of Port Authority Police,

Defendant-Appellant.

Before:

OAKES, *Chief Judge,*
WINTER and MINER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Mary Johnson Lowe, *Judge*) finding that portions of several Port Authority airport terminals are traditional public fora for First Amendment purposes and enjoining the enforcement of Port Authority regulations prohibiting the in-person solicitation of contributions and the distribution of literature within the terminals. We reverse as to the in-

person solicitation of funds but affirm as to the distribution of literature.

Affirmed in part, reversed in part. Chief Judge Oakes dissents in a separate opinion.

ARTHUR P. BERG, New York, New York (Joseph Lesser, Philip A. Maurer, Arnold D. Kolikoff, New York, New York, of counsel), *for Defendant-Appellant.*

BARRY A. FISHER, Los Angeles, California (David Grosz, Robert C. Moest, Fleishman, Fisher & Moest, David M. Liberman, Los Angeles, California; Jeremiah S. Gutman, Eugene N. Harley, Levy, Gutman, Goldberg & Kaplan, New York, New York, of counsel), *for Plaintiffs-Appellees.*

Arthur Eisenberg, Michael Simon, New York, New York, *for Amicus Curiae New York Civil Liberties Union.*

WINTER, *Circuit Judge:*

Appellant Walter Lee, now deceased, was the official responsible for enforcing a regulation of the Port Authority of New York and New Jersey, the party controlling the defense in the instant matter,[1] banning the solicitation of money and distribution of literature within the terminals of three New York area airports. The district court struck

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[1] The district court dismissed the Port Authority as a defendant in 1977 pursuant to *Monroe v. Pape*, 364 U.S. 167 (1961), and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

down the regulation on the grounds that "the terminals . . . possess the characteristics of a bustling metropolitan boulevard" and are traditional public fora for expressive activity. After the district court's decision, the Supreme Court decided *United States v. Kokinda*, 110 S. Ct. 3115 (1990), which we believe dictates reversal insofar as the district court invalidated the Port Authority's ban on the in-person solicitation of funds but affirmance insofar as it invalidated the Port Authority's ban on the distribution of literature.

BACKGROUND

This action for declaratory and injunctive relief under 42 U.S.C. § 1983 began in 1975. After several detours described in the district court opinion, *see International Society for Krishna Consciousness, Inc. v. Lee*, 721 F. Supp. 572, 573-74 (S.D.N.Y. 1989), that court entered summary judgment in favor of the International Society for Krishna Consciousness, Inc. ("ISKCON").

The essential facts are not contested. ISKCON is a not-for-profit religious corporation whose members perform a ritual known as *sankirtan*. The ritual consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." While the distribution or sale of religious literature is a major part of the ritual, its primary purpose appears to be fundraising. ISKCON states, for example, that donations received through *sankirtan*, "including those received for religious literature, not only defray printing and other distribution costs, but are the very lifeblood and principal means of support of [the] religious movement."

The Port Authority was created by an interstate compact between New York and New Jersey. It owns or operates some thirty-three facilities within the Port District. Among these are the three airport terminals at issue in the present case, John F. Kennedy International Airport ("Kennedy"), La Guardia Airport ("La Guardia"), and Newark International Airport ("Newark"). Together, these airports constitute one of the busiest and most heavily used metropolitan airport complexes in the world. In 1986, they served nearly 79 million travelers, approximately eight percent of the domestic airline market and more than half of the Trans-Atlantic market. By the latter part of this decade, it is estimated that they will serve at least 110 million passengers per year.

Most of the space at Kennedy, La Guardia and Newark is leased to commercial airlines, each of which bears primary responsibility for its own leasehold. The Port Authority retains control over the unleased portions of the airports – specifically, parts of the International Arrivals Building at Kennedy, the Central Terminal Building at La Guardia, and the North Terminal Building at Newark. Initially, ISKCON challenged restrictions on *sankirtan* in both leased and unleased portions of the airports, but after a series of legal skirmishes over the need to join various commercial airlines as defendants and, once joined, over their status as state actors, the portion of the litigation involving the airlines was settled. The instant appeal thus pertains only to those unleased portions of Kennedy, La Guardia and Newark – to which we refer for convenience as "terminals" – subject to the Port Authority's direct control.

The public has access to the terminals, which contain various commercial establishments. At the time of ISKCON's submissions to the district court on the summary judgment motion, for example, the lobby of the International Arrivals Building at Kennedy included two restaurants, two snack stands, a bar, a postal substation and postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, two currency exchange facilities, a dental office, and an area for the display of art exhibits. Along the east and west corridors of that same building were some ten duty-free shops, five bars, two snack stands, a telegraph office, two bookstores, two newsstands, a bank, four travel insurance facilities, two currency exchanges, two cookie and candy shops, a cash and traveler's check machine, an India store, and a boutique-sized Bloomingdale's. Similar establishments lined the lobbies and corridors of both the Central Terminal Building at La Guardia and the North Terminal Building at Newark.

Although these areas are open to the public, virtually everyone who enters the terminal does so for a purpose related to air travel. These include travelers, persons meeting or seeing off passengers, members of flight crews, and employees of the terminal, an airline or a business in the terminal.

The Port Authority has promulgated a regulation forbidding both the solicitation of money and the repetitive distribution of literature within such areas. That

regulation, which effectively prohibits ISKCON from performing *sankirtan*,[2] states in pertinent part:

> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.

ISKCON moved for summary judgment on the ground that the airport terminals are traditional public fora for expressive activity and that the Port Authority's regulation thus violates the First Amendment. The district court granted ISKCON's motion, whereupon the Port Authority, in Mr. Lee's name, appealed.

DISCUSSION

The Port Authority does not dispute that ISKCON's in-person solicitation of contributions and distribution of

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[2] While the Port Authority concedes that *sankirtan* may be performed on the sidewalks outside its airports, *ISKCON* does not seek access to those areas. The district court thus concluded that the relevant forum for purposes of determining ISKCON's rights is the place to which ISKCON seeks access – namely, the interior portions of the airport terminals. *See Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 801 (1985).

religious literature are protected speech within the meaning of the First Amendment. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Unlike *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990), which held that begging is not "the kind of 'expressive conduct' protected . . . by the First Amendment," *id.* at 153, the issue here is whether the terminals at Kennedy, La Guardia and Newark are traditional fora for ISKCON's concededly protected activities. Because the terminals are open to the public, heavily traveled and contain a wide array of commercial establishments, the district court concluded that they are akin to public sidewalks and, based on that conclusion and our decision in *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968),[3] struck down the Port Authority's regulation.

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[3] *Wolin* held that the Port Authority's bus terminal in New York City was an appropriate place for distributing leaflets, carrying placards and conducting antiwar discussions with passing pedestrians. We noted that the bus terminal was a place "where the relevant audience [for an antiwar protest] may be found." *Id.* at 90. Because Wolin's antiwar protest was aimed at both "the general public and . . . a special audience – servicemen traveling to and from their bases, particularly buses arriving from Fort Dix" – we struck down the Port Authority's "plenary prohibition of speech" as violative of the First Amendment. *Id.* at 90-91.

The theory of *Wolin* would appear to protect the in-person solicitation of funds inside the bus terminal. Whether that result is still good law need not be decided. *Wolin's* rationale regarding the right to reach particular audiences seems undermined by the Supreme Court's analysis concerning traditional

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Public forum analysis is derived from the axiom that "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799 (1985). In determining whether a particular restriction on protected speech is permissible, the Supreme Court has "often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Restrictions on identical kinds of speech may be struck down or upheld "depending on the character of the property at issue." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

In recent years, the Supreme Court has classified government-owned property into three categories – "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius*, 473 U.S. at 802. Traditional public fora are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Public streets, sidewalks and

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(Continued from previous page)

public fora, designated fora and nonpublic fora described two paragraphs *infra* in the text of this opinion and by, for reasons stated later in the text, *Kokinda*. However, the Port Authority bus terminal, or portions thereof, contains various commercial establishments that serve non-traveling pedestrians off adjoining streets, *id.* at 85, and is arguably like a public street. In contrast, commercial establishments in the air terminals at issue in the instant matter are not realistically used by persons not connected with air travel.

public parks are paradigmatic examples of such fora, although streets through military basis, *see Greer v. Spock*, 424 U.S. 828 (1976), are a noteworthy exception.

Designated public fora are areas not traditionally open to assembly and debate that the pertinent governmental authorities have intentionally opened for public discourse. *See Cornelius*, 473 U.S. at 802. Nonpublic fora lack the characteristics of traditional public fora and have not been acknowledged by the pertinent governmental authority as consistent with expressive activity. Speakers may be excluded from traditional or designated public fora "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id* at 800. In traditional and designated public fora, therefore, the government may impose only reasonable time, place and manner restrictions unless there is a compelling state interest. By contrast, restrictions on speech are permissible in nonpublic fora so long as they are reasonable and viewpoint-neutral. *See Perry Education Ass'n*, 460 U.S. at 49 & n.9. The Court's three-tiered framework, with its focus on the purposes and attributes of the forum rather than the speaker's desired audience, *see supra* note 3, has become the governing paradigm where, as here, a court must ascertain whether to apply strict scrutiny or some less demanding standard.

ISKCON does not argue that the Port Authority has designated its airport terminals as public fora for expressive activity. This case thus differs from *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), in which the Eighth Circuit held that the City's terminals were traditional public fora but also

emphasized that "[t]he City's regulations . . . implicitly acknowledged that the first amendment activities that take place in more traditional public forums are not incompatible with the purposes of an airport's public concourses." In the instant matter, the Port Authority has not conceded, by regulation or otherwise, that expressive activities are consistent with its operation of Kennedy, La Guardia and Newark. The sole issue on appeal, therefore, is whether the terminal areas are traditional public fora for protected speech.

Neither the Supreme Court nor this circuit has ever addressed the issue of where airline terminals fit in public forum analysis. The "well-established" authority in other circuits, *see Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. Unit A Dec. 1981), is that airport terminals are traditional public fora for speech activities. *See, e.g., Jamison, supra; Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987). Prior to the decision in *Kokinda*, this panel was prepared to follow the authority established in other circuits. To hold otherwise would have created a conflict among the circuits over an issue that the Supreme Court has declined to address despite numerous opportunities. Where there is the considerable weight of unanimous authority, we believe that creation of such a circuit conflict must be based on an abiding conviction that the view of several other courts is unreasonable, lest the Supreme Court's ability to resolve conflicts among the circuits be impaired by the sheer number of such conflicts. We believe, however, that *Kokinda*, has altered public forum analysis and that we would not be

faithful to Supreme Court precedent if we were to follow the other circuits.

Until *Kokinda*, and with the exception of *Greer*, the Court's decisions treated streets and sidewalks as traditional public fora without engaging in any detailed analysis of their particular purposes. In *Frisby v. Schultz*, *supra*, for example, the Court held that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. The *Frisby* Court explained that "[n]o particularized inquiry into the precise nature of a specific street is necessary" because "*all* public streets are held in the public trust and are properly considered traditional public fora." 487 U.S. at 481 (emphasis added). Given this approach, the district court's reliance on the visual and other similarities between the terminals' passageways and a "bustling metropolitan boulevard" was understandable.

Kokinda involved a free-standing post office with its own sidewalk and parking lot. The sidewalk was neither connected to any pedestrian thoroughfare nor used for any purpose other than negotiating the space between the post office and parking lot. 110 S.Ct. at 3118. At issue was a Postal Service regulation prohibiting the in-person solicitation of money on postal premises. *Id.* Four members of the Court concluded that the sidewalk was a nonpublic forum and thus applied the reasonableness test of *Cornelius*. Writing for the four, Justice O'Connor stated that the sidewalk was not a public passageway designed "to facilitate the daily commerce and life of the neighborhood or city" but was intended "solely to assist postal patrons" to get access to postal services. *Id.* at 3120. She

further agreed with the Postal Service that the in-person solicitation of funds is "inherently disruptive of the postal service's business" and "impedes the normal flow of traffic." *Id.* at 3123. In particular, she noted that such solicitation "requires action by those who would respond" and is to be distinguished from the distribution of literature that may be taken without pause to be read later. *Id.*

Justice Kennedy, who wrote separately, did not reach the question of whether the sidewalk was a traditional public or nonpublic forum. However, he voted to uphold the regulation as an appropriate time, place and manner restriction on the ground that the government has "a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions." 110 S. Ct. at 3126. His agreement with the plurality was thus limited to the view that the in-person solicitation of funds is disruptive of postal transactions. He noted, however, his belief that other, less disruptive forms of expressive activity, such as leafletting, should be permitted on the sidewalk. *Id.*

Notwithstanding the different rationales employed by the plurality and Justice Kennedy, *Kokinda* dictates reversal of the judgment in the instant action insofar as it invalidates the Port Authority's regulation prohibiting in-person solicitation of funds in the terminals of the three airports. A majority held in *Kokinda* that in-person solicitation of money on the post office sidewalk could be prohibited without violating the First Amendment. Like the sidewalk in *Kokinda*, the Port Authority's terminals are remote from pedestrian thoroughfares and are

intended solely to facilitate a particular type of transaction – air travel – unrelated to protected expression. Persons using the passageways in terminals are not there primarily to meet a friend for lunch, window-shop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used. They are there solely as air travelers, persons connected with air travelers, or employees of businesses serving air travelers.

The Port Authority's anti-solicitation restriction serves precisely the same purpose as did the restriction upheld in *Kokinda*. Kennedy, La Guardia and Newark are funded by user fees and operated so as to make a regulated profit. Just as the Postal Service in *Kokinda* had a significant interest in protecting users of the branch office from the in-person solicitation of funds, the Port Authority has an interest in protecting its airport patrons from the identical disruption of in-person solicitation. It is true that the various commercial establishments and art exhibits at the three airports create an appearance similar to a busy downtown street. It is also true, however, that the facilities in question exist solely to accommodate the needs of air travelers, just as the post office and sidewalk in *Kokinda* existed solely to facilitate the use of postal services.

Given the possibility of further review, we take care to detail our understanding of *Kokinda*. We read the plurality opinion of Justice O'Connor to distinguish between passageways or other facilities that exist solely to facilitate the public's carrying on of a particular endeavor – subway or air travel for example – and passageways or facilities that enable the public to carry out the multitude

of purposes persons pursue in their daily life – the typical Main Street. The former are non-public fora, and government may prohibit the in-person solicitation of funds at least where those using the passageway or facility might be disrupted by such solicitation. Passageways or facilities used solely for a particular purpose are of course among society's choke-points and thus particularly useful to those seeking to solicit funds. However, where the particular purpose is such that the public uses them as a matter of necessity, or at least great convenience, we read the plurality opinion to allow the prohibition of in-person solicitation of funds to prevent disruption of that public. Justice Kennedy reaches the same result because he believes that a prohibition on the in-person solicitation of funds is a legitimate time, place and manner restriction.

The Port Authority's concern over disruption of the air-traveling public is justified on the present record. That record establishes that pedestrian congestion is one of the greatest problems facing the three terminals. Much of the facilities in question was built before wide-body aircraft, and a pressing need for expansion exists. Air travelers, who are often weighted down by cumbersome baggage and may be hurrying to catch a plane or to arrange ground transportation, will find in-person solicitation even more disruptive than did the postal patrons in *Kokinda*. We are thus unable to distinguish that case.

With regard to the Port Authority's ban on the distribution of literature, we read *Kokinda* as looking in a different direction. The four dissenting justices believed the sidewalk to be a public forum and additionally indicated that they perceived no relevant distinction between the in-person solicitation of funds and the distribution of

leaflets. *See* 110 S. Ct. at 3126-39. They would therefore allow the latter in the air terminals in question. So too, we believe, would Justice Kennedy, whose concurring opinion stressed the need "to protect public places where traditional modes of speech and forms of expression can take place." 110 S. Ct. at 3125. Justice Kennedy relied entirely upon the distinction between the disruptive effect of the in-person solicitation of funds and the lesser inconvenience of the distribution of literature in upholding the Postal Service regulation and did not reach the public/nonpublic forum issue. We thus count him as having adopted a view that would permit the distribution of literature in the instant matter. We also note that the four justices who considered the post office sidewalk to be a nonpublic forum also relied in part on the distinction between in-person solicitation and leafletting in upholding the regulation. *See* 110 S. Ct. at 3123-24. There was thus at least a majority, and perhaps more, that would allow the latter. We therefore hold that the Port Authority must provide reasonable access to the terminals for the distribution of literature.

Affirmed in part, reversed in part.

OAKES, *Chief Judge*, dissenting:

At issue in this case is whether the terminal areas controlled by the Port Authority at Kennedy, LaGuardia and Newark airports are traditional public fora, such that the Port Authority's regulation against leafletting and solicitation must be examined under the strict scrutiny standard articulated in *Perry Ed. Ass'n v. Local Educators'*

Ass'n, 460 U.S. 37 (1983), and its progeny. Although this issue has remained open until today in this Circuit, two of our sister Circuits have recognized that airport terminals are traditional public fora. *See Jamison v. City of St. Louis*, 828 F.2d 1280, 1282-84 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987). In addition, at least three other circuits have recognized airport terminals as generic "public fora," without distinguishing whether they are of the traditional or designated category. *See United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 763-68 (D.C. Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 626-27 (5th Cir. Unit A. Dec. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *see also Gannett Satellite Information Network v. Berger*, 716 F. Supp. 140, 149 (D.N.J. 1989) ("Newark Airport is a public forum."), *aff'd in part & rev'd in part*, 894 F.2d 61 (3d Cir. 1990). *But see International Caucus of Labor Comms. v. Metropolitan Dade County*, 724 F. Supp. 917, 923 (S.D. Fla. 1989) (Miami International Airport terminal not a traditional public forum). Moreover, we have previously noted in dicta that Krishna devotees practice *sankirtan* in "various public forums – airports, bus stations, state fairs," *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 434 (2d Cir. 1981), and have held that the Port Authority's bus terminal in New York City is a "public forum." *See Wolin v. Port of New York Auth.*, 392 F.2d 83, 88-91 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).[1]

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[1] In *Wolin*, we did not specify whether the bus terminal was a traditional public forum or a designated public forum, as

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Against this backdrop of authority, the majority acknowledges that before the Supreme Court's recent plurality opinion in *United States v. Kokinda*, 110 S. Ct. 3115 (1990), it was prepared to hold that the Port Authority's airport terminals were traditional public fora. However, the majority believes that *Kokinda* has "altered" the Supreme Court's public forum analysis, which it claims now must focus on the distinction between "passageways or other facilities that exist solely to facilitate the public's carrying on of a particular endeavor and [those] that enable the public to carry out the multitude of purposes persons pursue in their daily life." *Supra*. While the latter may be traditional public fora, the majority finds that *Kokinda* stands for the proposition that the former are categorically not public fora. Because I disagree with this assessment, and instead believe that *Kokinda* is neither controlling nor a substantial deviation from the Court's public forum analysis, I respectfully dissent.

Generally, traditional public fora include locations such as streets and public parts, "clearly held in trust, either by tradition or recent convention, for the use of citizens at large," where discussions of public questions

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public forum analysis at that point in time had not yet given rise to the now-familiar triparite distinction between traditional public fora, designated public fora, and non-public fora. Nevertheless, *Wolin's* analogy of the bus terminal to a public street, both with large crowds and stores and concessionaires, supports the proposition that under modern public forum analysis, the Port Authority bus terminal is a traditional public forum. *See id.* at 89.

might ordinarily take place. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984); *see also Perry*, 460 U.S. at 45. But the physical characteristics of a forum do not necessarily determine traditional public forum status. *See Kokinda*, 110 S. Ct. at 3120 ("The mere physical characteristics of the property cannot dictate forum analysis."). Even a public street, for example, may not be a traditional public forum along that portion that runs within the confines of a military base. *See Greer v. Spock*, 424 U.S. 828 (1976) (military reservation, including public street running through it, not traditional public forum). Nor does unlimited public access to a forum necessitate a finding that it is a traditional public forum. *See id.* at 836.

Similarly, the *purposes* for which a forum is designed and to which it is put are not alone determinative of its status. Certainly, the purposes of a forum are highly relevant to the traditional public forum inquiry. In *Greer*, for example, the exigent national security purposes of a military post weighed heavily in favor of the Supreme Court's finding that the Fort Dix Military Reservation is not a traditional public forum. *See* 424 U.S. at 837-38. However, this observation does not compel what I believe is the majority's simplistic conclusion that a forum's purpose can alone dictate its status. Virtually all Government-owned property has an ostensible "purpose" other than the promotion of free speech, assembly, and debate. It can scarcely be argued that the Government builds streets, which are ordinarily traditional public fora, for the primary purpose of fostering First Amendment activities. At least, the Supreme Court does not think it can be. *See Schneider v. State*, 308 U.S. 147, 160 (1939) ("Municipal

authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, *the primary purpose to which the streets are dedicated.*") (emphasis added); *see also Wolin*, 392 F.2d at 89 (acknowledging that Port Authority bus terminal is "designed for precisely the purpose of transit," but nevertheless finding it to be a public forum).

Further undermining the argument that purpose alone is determinative of a forum's status are the Supreme Court's numerous decisions holding that some governmental fora that serve no purpose other than communication of ideas are nevertheless not traditional public fora. *See Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 804 (1985) (federal charity fundraising drive); *Perry*, 460 U.S. at 46 (school district's internal mail system); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (residential mailboxes); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (plurality opinion) (advertising space inside city buses).

Nor do I think that the Supreme Court's recent decision in *United States v. Kokinda*, 110 S. Ct. 3115 (1990), announces a new rule that changes a forum's purpose from being an important factor in public forum analysis to being the sole determinant of a forum's status. At the start, it must be emphasized that *Kokinda* is of questionable precedential value, in that only four Justices agreed that the post office sidewalk at issue was not a traditional public forum. The fifth Justice who cast his vote in favor of the plurality's result agreed that the regulation at issue was a reasonable time, place, and manner restriction, and conceded that "there remains a powerful argument that,

because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum." *See id.* 3125 (Kennedy, J., concurring).

Moreover, even reading *Kokinda* as controlling, there is no basis to conclude from the plurality's opinion that a forum's purpose will, *ipso facto*, illuminate its status. In concluding that the postal sidewalk was not a traditional public forum, Justice O'Connor assessed not only the postal sidewalk's purpose, but also its location, *see id.* 3121, the degree of public access afforded by the sidewalk, *see id.* at 3120, and whether such sidewalks had " 'traditionally served as a place for free public assembly and communication of thoughts by private citizens.' " *Id.* at 3121 (quoting *Greer*, 424 U.S. at 838). In fact, it is the latter inquiry that Justice O'Connor concluded "has illuminated our traditional public forum analysis, and that we apply today." *Id.* This pivotal language demonstrates that the majority is simply wrong in concluding that *Kokinda* stands for the immutable proposition that facilities that exist solely for the "public's carrying on of a particular endeavor . . . are nonpublic fora."

In short, I believe that *Kokinda* reaffirms the basic proposition that traditional public forum status does not turn on any single factor or characteristic. Rather, a more complex balancing determination is necessary, in which it must be determined whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance." *Wolin v. Port of New York Auth.*, 392

F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *see also Fernandes*, 663 F.2d at 626 (adopting *Wolin*'s factors for determining public forum status). In other words, we balance the governmental purposes of the forum on the one hand against the tradition of public access to that forum, and the interests of those who wish to use the forum for another purpose, on the other hand. *See Cornelius*, 473 U.S. at 800.[2]

Employing this balancing test, I would agree with the district court that the airport terminals at issue are traditional public fora. For the reasons set forth below, I see no meaningful distinction, in terms of the balance between

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[2] The public forum analytic framework has come under attack from many commentators, and even from four Supreme Court Justices, in part because it lends itself to mechanistic labeling of fora as public or non-public on the basis of their physical characteristics alone. *See Kokinda*, 110 S. Ct. 3127 & n.1 (Brennan, J., dissenting). Even if I agreed with the critics and wished to disregard public forum analysis, what the Supreme Court has adopted is not in my power to cast aside. Nevertheless, I see no necessary inconsistency between public forum analysis and a particularized balancing of First Amendment interests against governmental interests. *See Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring). To put it differently, I view public forum analysis, properly applied, not as a device for inflexible categorization of governmental fora as public or non-public per se. Rather, public forum analysis is a useful shorthand method of evaluating the competing interests of individual speakers in exploiting important channels of communication, and of the Government in regulating the use of its own property. *See* L. Tribe, *American Constitutional Law* § 12-24, at 987 (2d ed. 1988); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1234-35 (1984).

the public's tradition and interest in access and the governmental interest in controlling its property, between airport terminals and ordinary public streets or sidewalks. Both airport terminals as well as public streets and sidewalks are generally accessible to the public, available and appropriate at all times for discussion of public questions. *See Jamison*, 828 F.2d at 1283 ("[A]n airport terminal is much like a busy city street. Both are lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please."); *United States Southwest Africa/ Namibia*, 708 F.2d at 764 ("[I]t seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases."); *Fernandes*, 663 F.2d at 627 (noting "lack of restrictions on entry by the general public, and the commercial, street-like character of the terminal concourses"). In fact, it is conceded that the terminal areas at Kennedy, LaGuardia and Newark contain restaurants, post offices, banks, drug stores, and many other commercial establishments that one would normally expect to encounter on the main thoroughfare of any town in America. The Government's interest in controlling movement and traffic in both fora, while substantial, is no greater in the context of an airport terminal complex than in the context of the public roadway system. Accordingly, I see no greater incompatibility between governmental interests and free-speech interests on an ordinary public street than in the general circulation areas of New York's major airport terminals.

Nonetheless, the Port Authority contends that airport terminals differ from traditional public fora such as

streets, sidewalks, or parks in five different ways: their unique design and usage, their congestion problems, their security problems, their specialized user-fee financing, and the presence of captive audiences. I consider each of these in turn and find none of them individually or collectively persuasive.

Airport terminals and streets or sidewalks alike are designed and used for the efficient movement of travelers. I see no distinction between the amount of planning going into the design of airport passenger terminals compared to our modern urban roadway systems. Both are used for the same purposes – transportation – and I do not see how we can attach any constitutional significance to the fact that one involves travel by airplane and the other by automobile.

The Port Authority puts particular weight on the fact that airport terminals are designed to be geographically isolated from other parts of the community.[3] Indeed, the *Kokinda* plurality emphasized the separation of a post office sidewalk by a parking lot from other municipal sidewalks as an important factor in determining that the post office sidewalk at issue was not a traditional public forum. *See Kokinda*, 110 S. Ct. at 3121 ("[T]he *location* and

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[3] Public highways, the Port Authority points out, isolate the airports from the surrounding communities. These highways, however, are most likely public fora. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora."). It would be anomalous to conclude that the airport's separation from the rest of the community by highways, which are themselves concededly public fora, could weigh in favor of finding the airport terminals to be non-public fora.

purpose of a publicly-owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.") (emphasis added). However, as stated above, *Kokinda* is of questionable precedential value. Moreover, I am considerably less than certain that if the post office building in *Kokinda* had also included the vast array of shops, restaurants, and service centers characteristic of Kennedy, LaGuardia, and Newark Airports that even four Justices would have found that the sidewalk outside was not a traditional public forum. "The Postal Service [had] not . . . open[ed] postal sidewalks to any First Amendment activity." *Id.* at 3121. The Port Authority, by contrast, has invited and welcomed extensive expressive activity within its airport terminals.

I thus think the physical isolation of a forum is relevant only in light of the reasons for its isolation. Only when the Government isolates a particular forum for the purpose of regulating public access does location emerge as a relevant factor in favor of denying public forum status. So, for example, the isolation or separation of a military base from the surrounding community in order to discourage prying eyes would render location highly relevant to the public forum inquiry. Where physical isolation of a forum is the product of happenstance or for functional purposes unrelated to regulation of public access, location becomes far less relevant. It is obvious why airport terminals are isolated and separated from the buildings and skyscrapers of downtown Manhattan and to a certain extent from quiet residential areas. The isolation – if it can be called that – of airports from other parts of the community is in deference to the physics and audiophonics of aviation and not to any notion that the

movement of people and ideas should be restricted. This physical separation does not imply that the airport is any less socially integrated into the everyday flow of people and ideas around the New York metropolitan region. To the contrary, few are the places where one can meet so many persons from diverse parts of the New York metropolitan area as inside its airport terminals.

As for problems of congestion, public streets and sidewalks no less than airport terminals are subject to tremendous traffic problems all over the New York metropolitan area. New Yorkers and others who have had the misfortune of trying to fly out of one of the New York airports during rush hour have discovered the hard way that the greatest risk of missing their flight might well come from the delay of traffic on public streets leading to the airport rather than from the crowds of people circulating within the airport terminals. Moreover, congestion might well weigh in favor of finding the airport to be a traditional public forum. The airport terminals are "an appropriate place for expressing one's view precisely because the primary activity for which [they are] designed is attended with noisy crowds . . . some unrest and less than perfect order." *Wolin*, 392 F.2d at 90 (footnote omitted). I am confident that if the Port Authority can withstand the inefficiencies of movement occasioned by travelers' stopping to visit the numerous vendors and boutiques lining the terminal's corridors (and from which the Port Authority, of course, derives revenue), it can also tolerate at least some inconveniences attendant upon the exercise of plaintiffs' fundamental First Amendment freedoms.

Similarly, security problems are of equal concern on public streets as in airport terminals, even if security problems on the streets are more innocuously labeled as "crime" rather than "terrorism." No one could seriously contend that streets located in dangerous city neighborhoods are not traditional public fora by virtue of the Government's greater need to promote public safety in these areas. The Port Authority no doubt has a powerful interest in maintaining security at its airports. But these concerns are redressable through reasonable time, place, and manner restrictions regulating access to secured areas.

The specialized financing of airports through user-fees, rather than general tax revenue, has no relevance to whether the terminals are traditional public fora. Many streets are also financed by user-fees, e.g., by tolls or by subdivision exactions. By contrast, the top secret areas of military bases, which no one would argue are traditional public fora, are financed by general tax revenues.

Finally, the Port Authority's fear that travelers are a "captive audience" at the mercy of the Krishnas is not well-founded. The Krishnas seek access to persons only in general circulation areas and not check-in areas or baggage claim areas. On these facts, the Constitution requires those who are offended by the Krishnas to "avoid further bombardment of their sensibilities . . . by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

In light of my conclusion that the airport terminals are traditional public fora, it follows that the Port Authority may not impose a complete prohibition on First

Amendment activities absent a compelling governmental interest. I would find no such interest here. Accordingly, the Port Authority's virtual blanket prohibition on First Amendment activities inside the terminal areas it controls cannot be upheld. This much even the majority concedes insofar as leafletting is concerned.

It is of course true that the Port Authority may promulgate reasonable content-neutral time, place, and manner restrictions narrowly tailored to serve a significant governmental interest and permitting alternative channels for communication. *See Perry*, 460 U.S. at 45. I have no doubt that the Port Authority's interest in expediting the movement and safety of travelers is significant. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981); *Fernandes*, 663 F.2d at 626; *Wolin*, 392 F.2d at 93. Therefore, I may well be persuaded that reasonable time, place, and manner regulations that, for example, require permits or badges for solicitors, or that limit the number of solicitors permitted, or that restrict the locations within the terminal buildings where solicitors may conduct their activities would pass constitutional scrutiny. *See, e.g., Heffron* (upholding limitation on Krishna solicitation at state fair to stationary booths); *International Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978) (upholding restrictions on locations of First Amendment activities within airport); *Wolin*, 392 F.2d at 94 ("[T]he Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the rights of expression may be exercised."). However, a complete prohibition of First

Amendment activity – such as the Port Authority's regulation – is, in my mind, not a narrowly drawn regulation that allows for alternative channels of communication, and therefore not constitutionally permissible.

Finally, the distinction between leafletting and fund solicitation that the majority draws I find to be without a difference. Both involve the same congestion, the same irritation, if you will. And may the content of the leaflets permitted be proscribed? If not, will solicitation of funds by leaflet be permitted? If not, what may the leaflet say?

I would affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,

Plaintiffs,

-against-

WALTER LEE, et al.,

Defendants.

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75 Civ. 5388 (MJL)

OPINION AND ORDER

(Filed SEP 18 1989)

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MARY JOHNSON LOWE, D.J.

Plaintiff International Society for Krishna Consciousness ("ISKCON") commenced this lawsuit in 1975, challenging the policy of the Port Authority of New York and New Jersey which prohibits the continuous and repetitive distribution of literature to, and solicitation of contributions from, passers-by in the public areas of the passenger terminals at John F. Kennedy, LaGuardia, and Newark International Airports ("the airports"). Plaintiffs claim that the Port Authority's prohibition of these activities within the public areas of the airports violates their rights under the First and Fourteenth Amendments of the Untied States Constitution. Presently before this Court is plaintiffs' motion for summary judgment declaring the Port Authority's regulation unconstitutional. For the reasons set forth below, we adopt the Magistrate's recommendation and grant plaintiffs' motion pursuant to Fed.R.Civ.P. 56.

BACKGROUND

Pursuant to a 1921 Congressionally consented-to compact between the States of New York and New Jersey, the Port Authority is charged with operating the airports at issue in this action. Numerous airlines lease much of that airport space for their own business purposes, and these leased areas are primarily within the control of the airlines. However, the unleased areas, namely, the Arrivals Building of the International Arrivals Building at Kennedy, the Central Terminal Building at LaGuardia,

and the North Terminal at Newark, remain within the control of the Port Authority. Affidavit of Morris Sloane at ¶ 4.

Plaintiff ISKCON is a New York not-for-profit religious corporation which promotes the theological and missionary views of the Krishna Consciousness. Plaintiff Brian Rumbaugh is a member and trustee of ISKCON. As related by counsel for plaintiffs, members of the Krishna Consciousness, in accordance with their religious mandate, are required to perform a ritual known as *sankirtan,* which consists of "going into public places, disseminating religious literature, and soliciting funds to support the religion." Plaintiff's Brief in Support of Motion for Summary Judgment at 6. The performance of *sankirtan* is apparently integral to the practice of Krishna Consciousness, indeed it is "the very lifeblood and principal means of support of this religious movement." *Id.* It is the performance of precisely these activities, however, which the Port Authority, through its regulations, prohibits within the public areas of the airports.

ISKCON commenced this action in 1975 against the Port Authority and its then Police Superintendent, Walter Lee. Because plaintiffs were, in the initial stages of this litigation, seeking access to airline-controlled property as well, Judge Carter – before whom this action was then pending[1] – held the airlines to be indispensable parties and, on that basis, denied plaintiffs' motion for preliminary injunctive relief. *International Society for Krishna Consciousness v. New York Port Auth.,* 425 F.Supp. 681

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[1] The present action was transferred to this Court in September of 1978.

(S.D.N.Y. 1977). Shortly thereafter, plaintiffs amended their Complaint to include, as defendants, several of the airlines leasing space from the Port Authority.

Arguing that their prohibition of plaintiffs' activities did not constitute state action, the airlines moved, in 1979, for dismissal of the Complaint as against them. This Court denied their motion, but certified the state action question to the Second Circuit. After accepting certification, the Court of Appeals subsequently remanded the case for further discovery and development of the evidentiary record. *ISKCON v. Air Canada*, 727 F.2d 253 (2d Cir. 1984). In 1984, we referred the action to Magistrate Michael H. Dolinger for completion of all pretrial matters.

Once discovery was completed, the airlines again moved for dismissal. In 1987, Magistrate Dolinger issued a Report and Recommendation in which he urged that, because the state action requirement had been satisfied, the motions be denied. Subsequent to this Report's issuance, all of the airlines entered into settlement agreements with plaintiffs. Consequently, the Superintendent of the Port Authority Police remains the only defendant to this action.[2]

Arguing that the Port Authority's regulations unconstitutionally prohibit protected First Amendment activity within a public forum, plaintiffs moved, in 1987, for

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[2] In 1977, Judge Carter dismissed the Port Authority as a defendant pursuant to *Monroe v. Pape*, 365 U.S. 167 (1961). *International Society*, 425 F.Supp. at 684-85.

summary judgment or, in the alternative, for a preliminary injunction.[3] Significantly, or so defendant argues, the Port Authority formally adopted regulations, in February of 1988, which prohibit, within the terminal buildings, the type of activity encompassed by *sankirtan*. However, these new regulations do not appear to interfere with the performance of that ritual in the exterior portions of the airports outside the terminal buildings. *See* Affidavit of Morris Sloane, Exhibit B.[4]

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[3] This alternative request for relief was later withdrawn in view of an agreement between the parties which permits the plaintiffs access to the terminal areas *pendente lite*.

[4] The new regulations provide in pertinent part:

B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions: . . .

1. The following conduct is prohibited within the inetrior [sic] areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

(a) . . .

(b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.

(c) The solicitation and receipt of funds.

. . .

2. The following conduct is prohibited at an air terminal:

(a) . . .

(Continued on following page)

In his Report and Recommendation ("R & R"), dated October 25, 1988, Magistrate Dolinger found that the terminal areas of the airports are, indeed, public fora, and accordingly held that the Port Authority's regulations unconstitutionally restrict the plaintiffs' First Amendment rights. Presently before this Court is the Magistrate's recommendation that plaintiff's motion for summary judgment be granted.

DISCUSSION

THE RELEVANT FORUM

The preliminary issue raised by the Magistrate's R & R, and defendant's Objections thereto, is what effect the Port Authority's newly adopted regulations have on the scope of this Court's inquiry. Defendant urges that all of the real property used in terminal operations – including the exterior sidewalks outside the terminal buildings where *sankirtan* is permitted – should be viewed as the relevant forum and that, accordingly, the regulations at issue be treated as time, place and manner restrictions.

(Continued from previous page)

(b) The performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity which constitutes a danger to persons or property, or which interferes with the orderly formation and progression of waiting lines, or which interferes with any of the following: pedestrian and/or vehicular travel; the issuance of tickets or boarding passes or equivalent documents for air or ground transportation; luggage or cargo movement or handling; the entry to and exit from vehicles; security procedures; government inspection procedures; cleaning, maintenance, repair or construction operations.

Adoption of this approach would have a significant impact on the course of this litigation since, as the R & R indicates, plaintiffs have disclaimed any intention of litigating the validity of such place restrictions. R & R at 8; Transcript of March 25, 1988 hearing at 19. In effect, there would be no litigable controversy remaining and this Court would be forced to dismiss the action.

However, we agree with the Magistrate that "in defining the forum we [should focus] on the access sought by the speaker." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 801 (1985). In the instant case, plaintiffs have consistently limited their demands for access to the interior of the terminal buildings only. Plaintiffs have never, during the fourteen year course of their lawsuit, sought similar access to the airports' exterior sidewalks, nor have they placed their availability in issue, presumably because their status as public fora is beyond per adventure. Moreover, defendant's identification of all airport property as the relevant forum, itself, appears to be of very recent origin. Thus to adopt, at this stage of the proceedings, defendant's present position as to the relevant forum would not only be contrary to the authority of *Cornelius*, but also "fundamentally unfair" given plaintiffs' disclaimer and the underlying "assumption . . . shared by all parties, that this lawsuit involved only the building interiors." R & R at 10.

In his Objections to the R & R, defendant argues that to define the relevant forum in accordance with the dictates of *Cornelius*, as the Magistrate did, would be "illogical since such an approach would render any place restriction on First Amendment activity a prohibition"

and would consequently lead to absurd results. Defendant's Memorandum of Law in Support of Objections at 47. By way of example, defendant argues that a hypothetical prohibition on leafletting activity in the eastern portion of a public park would not, under *Cornelius*, be treated as a place restriction on such activity, but as a prohibition. *Id.*

Defendant's Objections on this point are flawed for two reasons. First, defendant fails to offer any alternative legal standard for defining the relevant forum other than the one supplied by *Cornelius*. Instead, and without supporting legal authority, defendant presumes that by adopting airport-wide regulations, he can, overnight, broaden the scope of this Court's examination. In this approach, defendant places the proverbial cart before the horse. It is not the contested regulations which define the relevant forum, but the particular forum, and the access sought therein, which determines the propriety of the regulations.

Second, defendant's argument presumes that, like his hypothetical park, the interior and exterior portions of the terminal buildings are physically and functionally similar units of the airports as a whole. In point of fact, the exterior sidewalks in the present case share few of the characteristics of the terminals' broad interior vistas. Indeed, those sidewalks are physically, functionally, structurally and conceptually distinct from the airports' interior buildings and hardly offer the same opportunity for effective First Amendment communication. Defendant's argument glosses over these important distinctions and posits a focus too broad and artificial for meaningful forum analysis. Accordingly, we adopt the Magistrate's

determination that the interior airport terminals constitute the relevant fora.[5]

THE TERMINALS AS PUBLIC FORA

All parties to the present action concede that the activity in which plaintiffs seek to engage is, for First Amendment purposes, protected activity.[6] The central issue raised by the instant motion, then, is under what standard should the Port Authority's regulations be reviewed – an issue which, in turn, rests upon how the airport terminals are classified as fora. *Cornelius*, 473 U.S. at 797 (the extent to which the government may limit public access to its property depends on whether the property is a public or nonpublic forum). Plaintiffs assert that the terminals' physical and conceptual similarities to city streets and sidewalks, their identity as "covered public thoroughfares," mandate their treatment as traditional public fora. Citing the terminals' unique characteristics and the Supreme Court's arguably narrow definition of the public forum family, defendant urges, on the other hand, that the airports be regarded as non-public fora.

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[5] We also agree with plaintiffs that other courts have impliedly rejected similar propositions. *See, e.g., Int'l Society for Krishna Consciousness v. Rochford*, 585 F.2d 263, 272 (7th Cir. 1978) (City's contention "that any denial of use of airport facilities would not prevent the Krishna Society from presenting its views anywhere else in Chicago or even on the sidewalks outside the airport terminal" rejected).

[6] *See Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Murdoch v. Pennsylvania*, 319 U.S. 105 (1943).

In *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1982), and *Cornelius*, the Supreme Court identified three categories of fora – the traditional public forum, the designated public forum, and the non-public forum – and outlined the standards for review applicable to each within the First Amendment context. In both traditional and designated public fora, the government may not impose content-based restrictions on First Amendment activity unless those restrictions are narrowly tailored to further a compelling state interest. However, the government may impose in those fora content-neutral time, place and manner restrictions, provided such restrictions serve significant governmental interests and leave adequate alternative channels of communication open. *Perry*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 800. In a non-public forum, by contrast, the government may restrict expression, so long as the restrictions are reasonable and do not discriminate against certain viewpoints. *Perry*, 460 U.S. at 46.

It is now well settled that streets, parks and sidewalks are traditional public fora. These public places have been deemed "held in trust for the use of the public- . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45. Such places have, accordingly, been deemed "quintessential" public fora. *Id.*; *see also Frisby v. Schultz*, ___ U.S. ___, 108 S.Ct. 2495, 2499 (1988). The designated public forum is, by contrast, one which the "State has [intentionally] opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 802 ("The government does not

create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse"); *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986). Despite occasional conflation of the characteristics of these two categories, no serious contention is made here that the terminals fall within the designated forum family. Instead, plaintiffs assert that the airports' unique kinship to city streets render them "well within the notion of traditional public fora." Plaintiffs' Brief in Support of Motion for Summary Judgment at 26.

The Supreme Court has not yet ruled on the issue of whether airports constitute public fora. In *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), it granted certiorari on the question, but decided, since the regulation at issue amounted to a "sweeping ban" on all expressive activity, to rule on grounds of overbreadth. Consequently, the issue of the airport's status as a public forum was left unaddressed. The Second Circuit has also not decided whether airports are public fora, but has decided that similar transportation facilities warrant public forum treatment. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.) (Port Authority bus terminal public forum), *cert. denied*, 393 U.S. 940 (1968).

Nevertheless, every circuit which has decided the issue has uniformly held that the public terminal areas of large municipal airports are public fora. *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1289 (1988); *Jews for Jesus v. Airport Com'rs of Los Angeles*, 785 F.2d 791, 795 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *USSW Africa*, 708 F.2d 760, 764 (D.C.Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 627

(5th Cir. 1981), *cert. denied,* 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago,* (hereinafter "CAMP") 508 F.2d 921, 926 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975); *Kuszynski v. City of Oakland,* 479 F.2d 1130, 1131 (9th Cir. 1973); *ISKCON v. Wolke,* 453 F.Supp. 869, 872 (E.D. Wisc. 1978); *ISKCON v. Griffin,* 437 F.Supp. 666, 672-73 (W.D. Pa. 1977); *ISKCON v. Rochford,* 425 F.Supp. 734, 742 (N.D. Ill. 1977), *aff'd in part, rev'd in part,* 585 F.2d 263 (7th Cir. 1978); *ISKCON v. Engelhardt,* 425 F.Supp. 176, 180 (W.D. Mo. 1977). These courts found that the airports at issue were comparable to city streets in both physical and conceptual aspects which made it appropriate to accord them public forum status. Continuously open to the public and lined with shops, restaurants, newsstands and other businesses for use by the general public, these airports were found to be no less than covered public thoroughfares, indistinguishable from ordinary municipal streets save for their interior nature. *See, e.g., Jamison,* 828 F.2d at 1283; *USSW Africa,* 708 F.2d at 764; *CAMP,* 508 F.2d at 925; *See also, Wolin,* 392 F.2d at 89 (Port Authority bus terminal physically resembles city street). The pattern of activity and the number of people who used the fora daily were also relevant considerations. *See, e.g., USSW Africa,* 708 F.2d at 764.

Lined with all type of services "from banks to barbers to Bloomingdales," so too do the terminals here possess the characteristics of a bustling metropolitan boulevard. Plaintiffs' Memorandum of Law at 37.

> Publicly owned, conceived for public use, continuously open, stocked with a congeries of commercial sellers, dispensers of information, and diversions and conveniences of all sorts, they constitute one of the great crossroads in the

> vast metropolitan New York region and the nation's foremost hub of international travel, commerce, and exchange of information . . . The New York airports fit well within the notion of traditional public fora.

Id. at 25-26. Guided by the overwhelming precedent in this area, the Magistrate found plaintiffs' analogy to be a sound and persuasive one. So do we.

In so finding, however, the Magistrate's R & R appears to have moved beyond the two public forum categories – traditional and designated – enumerated in *Perry* and *Cornelius,* in order to incorporate the airport terminals within the public forum family. R & R at 13-14. In this approach, we do not concur, for we find that, as the functional equivalent of public streets, the airport terminals fit "well within the notion of traditional public fora." Accordingly, we need not address defendant's Objections to the R & R on this point.

We must, however, contend with defendant's initial argument, raised in his summary judgment papers, regarding the scope of the traditional public forum category. Defendant's understanding of this classification is a narrow one, limited to "streets and parks" alone, both of which defendant characterizes as a "unique species of public property." Defendant's Memorandum of Law at 16. This Court does not read *Perry* or *Cornelius* so narrowly. Had the Supreme Court intended its list of traditional public fora to be exhaustive, rather then [sic] merely paradigmatic, we believe it would have used more restrictive language. Indeed, the predecessors of those opinions appear to have invited extension of the traditional public forum concept by analogy. *See Hudgens*

v. NLRB, 424 U.S. 507, 515 (1976) ("The essence of those opinions is that streets, sidewalks, parks, *and other similar public places* are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1973) ("Here, we have no open spaces, no meeting hall, park, street corner, *or other public thoroughfare*"); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1938) ("Such use of the streets *and public places* has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens"). We think it unlikely that, by its brief enumeration, the *Perry* court intended to undo literally scores of lower court decisions, within and without this Circuit, which, relying on this earlier authority, build on the public forum concept by analogy. *See, e.g., Jamison*, 828 F.2d 1280, 1283 (8th Cir. 1987) ("an airport terminal is much like a busy city street"), *cert. denied*, 108 S.Ct. 1289 (1988); *Fernandes*, 663 F.2d 619, 627 (5th Cir. 1981) ("in view of . . . the commercial, street-like character of the terminal concourses . . . the [Dallas-Fort Worth] terminal buildings must be treated as public forums"), *cert. dismissed*, 458 U.S. 1124 (1982); *CAMP*, 508 F.2d 921, 925 (7th Cir. 1975) (terminal buildings at O'Hare Airport "resemble those public throroughfares [sic] which have long been recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information"), *cert. denied*, 421 U.S. 992 (1975); *Wolin*, 392 F.2d 83, 89 (2d Cir. 1968) ("The [bus] terminal, with its many adjuncts, becomes something of a small city – but built indoors, with its "streets" in effect set atop one

another . . . "), *cert. denied*, 393 U.S 940 (1968). *See also Frisby v. Schultz*, 108 S.Ct. at 2499 (public streets are "the *archetype* of a traditional public forum"). Nor do we find it plausible that the mere presence of a roof would preclude the terminals' designation as public fora when, in every other relevant respect, they are virtually identical to public streets and thoroughfares.

The second, and final, basis for defendant's Objections to the Magistrate's R & R is his view that the airport terminals are completely dissimilar to city streets "because unlike city streets they are devoted to the single purpose of facilitating air travel. This purpose is reflected in the airport terminals' financing, planning, conditions of congestion, creation of "captive audiences," isolation from the surrounding communities and virtually unique security problems." Affidavit of Morris Sloane at ¶ 10. Although we find the R & R adequately addressed these matters, we will briefly elaborate upon those points highlighted by the defendant's Objections.

Citing *Calash*, 788 F.2d 80 (2d Cir. 1986) and *International Society for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155 (3d Cir. 1982), defendant argues that the airports' specialized financing, reflecting their specialized purpose, precludes their denomination as public fora.[7] Defendant's reliance on *Calash* and *New Jersey Sports* for this proposition, however, is misplaced. No serious contention appears to have been made that the municipal stadium and the sports

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[7] Unlike streets and parks which are financed from general tax funds, the airports are financed from user fees and are therefore financially self-supporting.

complex, respectively at issue in those cases, fell within the traditional public forum category. Rather, the issue raised was whether those facilities had somehow been *designated* as public fora – an issue which is plainly not before this Court. The issue of funding in those cases was therefore relevant in determining whether the sites had been intentionally opened as fora for public discourse. *See, e.g., Calash,* 788 F.2d at 83 ("Under this approach, the circumstances under which the forum was created here show that the City did not intend to open Kennedy Stadium to the general public for all uses or permit its use as a profit making venture. The facility was constructed with funds provided by a federal grant and designated as a "service facility""). We also agree with plaintiffs that there are significant functional distinctions between the terminals and those sites at issue *Calash* and *New Jersey Sports,* for "unlike racetracks and stadia, which are "event specific," the airports here are continuously open without restriction on access by the general public." Plaintiffs' Response to Defendant's Objections at 10.

Defendant further argues that the presence of captive audiences distinguishes the airports from the traditional public fora of streets and parks. Defendant's Objections at 27. With this contention, we do not agree. Captive audiences group outside city concert halls, movie theaters, and outdoor concession stands to the same extent as they form at airport ticket counters, baggage conveyer belts, and security checkpoints. As the R & R indicates, bus terminals and railroad stations suffer from identical problems as well. R & R at 19. Such concerns, however, are the appropriate subject of reasonable time, place and

manner restrictions, not blanket prohibitions on expressive activity.[8]

Nor are pedestrian congestion and security concerns unique to the terminal facilities. Indeed, if concerns over the movement of traffic were sufficient justification for the suppression of First Amendment activity, then the clogged and narrow arteries of downtown Manhattan might, as easily, be denied public forum status. Like the presence of captive audiences, the Port Authority's legitimate concerns over congestion[9] and security are more appropriately the subject of time, place and manner restrictions. *See Fernandes,* 663 F.2d at 626 (traffic concerns do not "justify the total exclusion of those wishing to exercise free speech"); *Wolin,* 392 F.2d at 91 (absolute prohibition of leafletting cannot be defended on the ground that it would obstruct traffic).

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[8] Defendant's reliance on *Lehman* might be more persuasive were plaintiffs seeking access to the aircraft, themselves. We agree with plaintiffs, however, that, as it stands, defendant's analogy between, the terminals and *Lehman*'s city bus interior is, at best, "farfetched." Plaintiffs' Response to Defendant's Objections at 11. *See also USSW,* 708 F.2d at 767 ("A person in the airports' concourse or walkways who considers advertisement . . . to be objectionable enjoys the freedom simply to walk away that a passenger on a bus does not").

[9] It should also be noted that plaintiffs do not seek to perform *sankirtan* in any private offices, ticket counters and lines, check-in areas, baggage claim areas, or exclusively-leased waiting areas – in short, those areas where concerns over security, congestion and captive audiences may be particularly acute. Plaintiffs' Statement of Facts at ¶ 73.

Finally, and without much elaboration upon this proposition, defendant urges that the airports' lack of "integration into the surrounding community" precludes their denomination as public fora. Defendant's Objections at 24. If, by this argument, defendant means that geographical proximity to the surrounding community is an essential component of public forum status, he is quite mistaken, for remote, residential streets, removed from a city's nerve center, are no less deserving of such status than Times Square itself.[10] *Frisby*, 108 S.Ct. at 2500. If, on the other hand, defendant means that surrounding community members must pass through the situs on a daily basis, he fails to cite any authority for so sweeping a proposition. His reliance on *Flower v. United States*, 407 U.S. 197 (1972), and *Greer v. Spock*, 424 U.S. 828 (1976) is entirely misplaced. The basis for the Supreme Court's different treatment of the military reservations at issue in those cases was its finding, in *Flower*, that by allowing free and unrestricted access to Fort Sam Houston, the military authorities there had "abandoned any claim [of] special interest in who walks, talks, or distribute leaflets on [its] avenue[s]." 407 U.S. at 1843. The terminals at issue here, like the military reservation in *Flower*, are "open" fora; neither the Port Authority nor the airlines deny or monitor access by members of the general public to the interior general circulation ares of the airports. All

[10] At any rate, none of the airports at issue here are located more than twenty highway miles from midtown Manhattan and all are freely accessible by a network of major thoroughfares. *See* Plaintiffs' Exhibits 8-10.

members of the public are free to frequent the terminal facilities, regardless of whether their presence there is occasioned by a travel-related task. Plaintiffs' Statement of Facts at ¶ 77.

In short, none of the characteristics cited by defendant sufficiently distinguish the airport terminals from the "archetype of a traditional public forum." *Frisby*, 108 S.Ct. at 2499. Nor do we find defendant's repeated invocation of the terminals' "singular purpose of facilitating air transportation" any more persuasive. As the District Court noted in *Fernandes*:

> True, the principal purpose of the airport is to move people from one place to another via airplane; but the court must look beyond "principal" purposes to determine whether or not an area is a "public" forum. "Streets" are primarily designed to assist the movement of traffic and people, but they are proper First Amendment forums.

465 F.Supp. 493, 501 n.4 (N.D.Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). After careful consideration of defendant's Objections, we agree with plaintiffs that the airports' character, pattern of activity and nature of purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family. Given that finding, no argument is presented here – nor can one be made in earnest – that defendant's blanket prohibition on leafletting and solicitation is narrowly tailored to further a compelling state interest.

There being no genuine issue of material fact raised by the submissions, plaintiffs' motion for summary judgment is granted.

It Is So Ordered.

Dated: New York, New York
September 15, 1989

/s/ Mary Johnson Lowe
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. et al., Plaintiffs, -against- WALTER LEE, Superintendent of the Port Authority Police, individually and in his official capacity, et al., Defendants.	REPORT AND RECOMMENDATION 75 Civ. 5388 (MJL)

TO THE HONORABLE MARY JOHNSON LOWE, U.S.D.J.:

Plaintiffs commenced this venerable lawsuit in 1975 to seek injunctive and declaratory relief from the policy of the Port Authority of New York and New Jersey, which prohibited plaintiffs from distributing literature and soliciting contributions within the public areas of the passenger terminals located at John F. Kennedy International, LaGuardia, and Newark International Airports. The litigation was subsequently expanded to include as defendants several dozen airlines as well as the Port Authority, but the plaintiffs have settled with all defendants except the Port Authority. Accordingly, they are now limiting their attention to those public areas within

the terminals that are directly controlled by the Authority.

Having completed all discovery, plaintiffs seek summary judgment declaring that the defendant's policy denying them any access to those areas is invalid under the first and fourteenth amendments. For the reasons that follow, I recommend that the motion be granted.

I. Procedural History

When plaintiffs began this action, they named only the Port Authority and its then-police superintendent, Walter Lee. The focus of their suit was the refusal by the Authority and the airlines that had leased terminal space from the Authority to permit adherents of the Krishna Consciousness faith, or indeed anyone else, to stand inside any of the public areas of the terminals of the three major New York area airports for the purpose of leafleting and solicitation of contributions. In 1977 the District Court held that the lessee airlines were indispensable parties since the plaintiffs were seeking access to terminal space under their control. *See ISKCON v. New York Port Authority*, 425 F. Supp. 681, 686 (S.D.N.Y. 1977). The complaint was subsequently amended to include numerous airlines as defendants.

In 1979 the airline defendants moved to dismiss the complaint on the ground that their prohibition of plaintiffs' activities did not constitute state action. The court denied this motion, holding that the "symbiotic relationship" existing between the airlines and the Port Authority established sufficient state action to withstand a motion

to dismiss. (Memorandum Opinion and Order, July 23, 1982, at 55.) The court also denied plaintiffs' cross-motion for preliminary injunctive relief based on the representation of the Port Authority that it was not enforcing its prohibitory regulations during the pendency of the lawsuit. (*Id.* at 58.)

The District Court certified its "state action" decision to the Court of Appeals. Although the Court of Appeals initially accepted certification, it later issued a per curiam opinion declining to decide the issue and remanding the case for further development of the evidentiary record. *ISKCON v. Air Canada*, 727 F.2d 253 (2d Cir. 1984). Upon remand, the case was referred to me for all pre-trial purposes and discovery was completed on an expedited schedule.

The remaining airline defendants then renewed their motions to dismiss. On June 1, 1987, I issued a Report and Recommendation concluding that the state-action requirement had been satisfied and recommending that the motions therefore be denied. Subsequently, the airline defendants entered into settlement agreements with plaintiffs, leaving only the Port Authority police superintendent as a defendant.

On November 11, 1987, plaintiffs moved for summary judgment or, in the alternative, for a preliminary injunction restraining enforcement of the Port Authority's prohibitory policy. Plaintiffs subsequently withdrew their request for a preliminary injunction on the understanding that the Port Authority's interim agreement allowing leafleting and soliciting activities inside the terminals would

continue for the duration of the litigation. (*See* Plaintiffs' Reply to Opposition at 23.)

On February 11, 1988, before oral argument was heard on the summary judgment motion, the Port Authority formally adopted regulations prohibiting the distribution of literature and solicitation of donations in the interior terminal areas under its control but permitting such activity outside the terminal buildings. (*See* Affidavit of Morris Sloane, dated April 21, 1988, at ¶¶ 8, 9 & Exh. B p. 4.) These regulations apparently do not establish a new policy but rather amount to a codification of the pre-suit policy. (*See* Affidavit of Brian Rumbaugh, sworn to May 5, 1988, at ¶¶ 5-6). At the request of the Court, however, the parties have filed supplemental papers addressing the effect, if any, of these new regulations on the pending motion.

II. The Facts Established on the Motion

The International Society for Krishna Consciousness ("ISKCON") is a not-for-profit religious organization espousing the missionary views of Krishna Consciousness. Integral to this religion is the practice of *sankirtan*, which consists of "going into public places, disseminating religious literature and soliciting funds to support the religion." (Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at ¶ 3.) Plaintiffs wish to engage in this activity in the general circulation areas of John F. Kennedy International, LaGuardia, and Newark International Airports ("the airports"), which are owned by the states of New York and New Jersey and operated by the Port Authority. However, Port Authority policy

prohibits the continuous and repetitive distribution of literature and solicitation of money in the airport terminals. (Civil Rule 3(g) Statement of Defendant at ¶ 30. Defendant's Rule 3(g) Statement is annexed to the January 19, 1988 affidavit of Morris Sloane.)

The Port Authority is charged with operating the airports for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35.4 (West 1963). In accordance with its statutory powers, the Port Authority has leased much of the space in the airports to numerous airlines. Under these leases, the airlines exercise primary control over the leased areas while the Port Authority retains certain supervisory powers. (*See* Defendant's Statement at ¶¶ 32-38; Plaintiffs' Statement at ¶¶ 146-49.) The Port Authority retains complete control over all unleased areas, namely, the Central Terminal Building at LaGuardia, the International Arrivals Building at Kennedy, and the North Terminal at Newark. (Defendant's Statement at ¶ 29.) It is these unleased areas that remain at issue in this lawsuit.

The airport terminals under Port Authority control are busy places containing large open lobbies and corridors lined with a variety of shops, restaurants, and other businesses. (See Plaintiffs' Statement at ¶¶ 18, 21-23, 50-55, 66; Defendant's Statement at ¶¶ 3, 4, 11.)[1] For example, the

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[1] There are minor discrepancies between the plaintiffs' and defendant's statements of facts, possibly due to the passage of time between the two submissions. These variations are not material, as the precise number of each type of commercial establishment is less important than the undisputed fact that there are many such establishments bordering the Port Authority-controlled spaces. For purposes of this summary judgment motion, the defendant's version of the facts will be adopted whenever there are discrepancies.

second-floor lobby of the International Arrivals Building at Kennedy is bordered by two restaurants, two snack bars, a bar, a postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, and two currency exchange facilities; it also contains a dental office and a place for the display of art exhibits. (Plaintiffs' Statement at ¶ 18.) The second-floor corridors are lined by eight duty-free shops, four bars, two snack bars, a bank, two currency exchanges, two bookstores, two newsstands, two cookie/candy shops, four travel insurance areas, a cash/traveler's check machine, and a retail Bloomingdale's; they also contain seating facilities and free-standing advertising displays. (Defendant's Statement at ¶¶ 3, 4.)

The Port Authority-controlled areas are open to the public at all times. The Port Authority does not deny or monitor the access of the general public to the three airport complexes or to the general-circulation areas in the buildings. (Plaintiffs' Statement at ¶ 77.) Thus, the facilities are freely available to all persons, whether or not they have travel-related tasks. According to undocumented Port Authority surveys, 80% of the people in the airports are travelers, 15% are "meeters and greeters", and 5% are employees. (Defendant's Statement at ¶ 64.) In 1986, the airports served 78,846,000 passengers; this number is expected to increase to 110 million in the 1990s. (Plaintiffs' Statement at ¶ 10.)

III. Analysis

Plaintiffs' motion requires us to consider two separate if related issues. First, the recent adoption of regulations

by the Port Authority that explicitly authorize leafleting and solicitation on the sidewalks directly adjacent to the terminal buildings raises the question of whether plaintiffs' claim which is explicitly limited to a facial challenge to the absolute prohibition against solicitation and leafleting at the airport terminals – has been mooted. Second, if the claim is still viable, we must address the central question in this lawsuit, which is whether the public areas within the terminal buildings constitute public fora and thus must be made available, on reasonable terms, for first amendment activities absent compelling reasons for barring access.

A. The Relevant Forum

The initial question is whether the Port Authority's formal adoption of a policy permitting expressive activities on the sidewalks outside the terminal buildings moots plaintiffs' claim. This concern arises because plaintiffs have limited their lawsuit to a challenge against the facial validity of a prohibition on all first amendment activity and have explicitly disclaimed any intention to litigate the validity of "time, place, and manner" restrictions in this lawsuit. (*See, e.g.*, Memorandum and Order dated February 27, 1985, at 14-15; Transcript of September 25, 1984 hearing at 17-19; Transcript of March 25, 1988 hearing at 19.) Plaintiffs seek, in essence, simply a declaration that the public areas of the terminals are public fora and that the Port Authority must adopt regulations consistent with that conclusion. (*Id.* at 17-18.)

If the relevant forum in this case were deemed to encompass both the interior of the terminal buildings and

their adjacent sidewalks, then the Port Authority's policy could not be viewed as a total prohibition of first amendment activity but rather as a "time, place, and manner" restriction governing the airport terminal areas as a whole. In that case, plaintiffs' claim would presumably fail since the only litigable issue would be the reasonableness of the restriction, an issue beyond the scope of the complaint as defined by the plaintiffs.

This question was addressed in the parties' supplemental submissions. Based on those papers and the prior record in this case, I conclude that the relevant physical space for purposes of this action is the interior public space of the terminals. Accordingly, there remains a viable case or controversy justifying the entry of a declaratory judgment.

Leafleting and soliciting have always been permitted in the exterior areas (*see* Rumbaugh Aff., sworn to May 5, 1988, at ¶¶ 5, 6; Defendant's Statement (predating formal regulations) at ¶ 30: policy prohibits activities *in* the airport terminals), and the availability of those areas to the plaintiffs has therefore never been in issue in this suit. Plaintiffs did not litigate over the exterior because they did not have to, and accordingly all the parties have focused on the interior terminal area as a discrete and independent forum. This treatment is consistent with the existing case law, which has concentrated almost exclusively on interior areas, presumably because the status of sidewalks and other exterior areas as public fora is not questioned. *See, e.g., Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1289 (1988); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983);

Fernandes v. Limmer, 663 F.2d 619, 626 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).

The focus of the plaintiffs on the interior of the terminal buildings has further independent significance for this analysis. In *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 801 (1985), the Court declared that the relevant forum should be defined in terms of the access sought by the speaker. Here, the plaintiffs seek access, not to airport property generally, but specifically to the interior areas of the terminal buildings. This alone should justify the Court in proceeding to adjudicate the question of whether the building interiors constitute a public forum.

Indeed, to do otherwise would be fundamentally unfair to the plaintiffs. In declaring their willingness to forgo any challenge in this lawsuit to the reasonableness of time, place, and manner restrictions, plaintiffs were obviously relying on the assumption, then shared by all parties, that this lawsuit involved only the building interiors. We may reasonably infer that the premise for plaintiffs' stated position was that they sought some form of access to the interiors but were willing to postpone any legal challenge to the specific ground rules for such access. The current regulations do not grant such access and accordingly we cannot treat plaintiffs' narrow definition of their claim as tantamount to a surrender of their right to challenge the very policy that led to the filing of this lawsuit. In sum, the relevant space for purposes of public-forum analysis consists of the public areas within the terminal buildings.

B. The Public Forum

The question now posed is whether the interior terminal areas controlled by the Port Authority constitute a public forum. If so, a total ban on leafleting and soliciting[2] activities is unconstitutional unless it is necessary to serve a compelling government interest; otherwise only reasonable time, place, and manner restrictions are permissible. If these areas are not deemed to be a public forum, the Port Authority may restrict or prohibit particular forms of expression as long as it does not discriminate against specific viewpoints. *See generally Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983); *U.S. Southwest Africa*, 708 F.2d at 763.

Plaintiffs contend that the general circulation areas inside the terminals are public fora. They view the terminals as "covered public thoroughfares" closely analogous to the quintessential public fora of streets and parks:

> Publicly owned, conceived for public use, continuously open, stocked with a congeries of commercial sellers, dispensers of information, and diversions and conveniences of all sorts, they constitute one of the great crossroads in the vast metropolitan New York region and the nation's foremost hub of international travel, commerce, and exchange of information. . . . The New York airports fit well within the notion of traditional public fora.

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[2] The first amendment protects the distribution of literature, *Organization for A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), and the solicitation of contributions on behalf of a religious cause, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

(Plaintiffs' Brief in Support of Motion for Summary Judgment at 25-26).

Plaintiffs cite numerous cases in support of this conclusion. Indeed, the courts have unanimously agreed that airport terminals are public fora. *See, e.g., Jamison*, 828 F.2d at 1283 ("every court that has decided the issue has held that an airport is a public forum"); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 795 (9th Cir. 1986), *aff'd on other grounds*, 107 S. Ct. 2568 (1987); *U.S. Southwest Africa*, 708 F.2d at 766 ("an unusual consensus of judicial, legislative, and administrative opinion" classifies the public areas of airports "squarely within the public forum family"); *Fernandes*, 663 F.2d at 626; *Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *ISKCON v. Rochford*, 585 F.2d 263, 272 (7th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 924-26 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973); *ISKCON v. Wolke*, 453 F. Supp. 869, 872 (E.D. Wis. 1978); *ISKCON v. Engelhardt*, 425 F. Supp. 176, 180 (W.D. Mo. 1977). *See also* 45 Fed. Reg. 35,314 (1980) (Federal Aviation Administration declares that public areas of airports are public thoroughfares where first amendment guarantees apply). These courts found that the character, function, and design of the airports made them so similar to ordinary city streets that they merited identical first amendment treatment. *See, e.g., Jamison*, 828 F.2d at 1283; *U.S. Southwest Africa*, 708 F.2d at 764; *Fernandes*, 663 F.2d at 627; *Chicago Area Military Project*, 508 F.2d at 925.[3]

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[3] Some of these courts invoked additional considerations in support of their conclusion. *See, e.g., Jamison*, 828 F.2d at

(Continued on following page)

The Supreme Court has not yet addressed this question. Although the Court did affirm the Ninth Circuit in *Jews for Jesus*, that ruling was based on another ground – the substantial overbreadth of the airport policy; the Court explicitly declined to decide whether an airport is a public forum. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2573 (1988). Other Supreme Court cases are not sufficiently analogous to provide clear guidance.

The Second Circuit has also not reached this question with regard to airports, but has concluded that similar facilities are public fora. It has so categorized railroad stations, *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2d Cir. 1984), the Port Authority bus terminal, *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968), and, by implication, subway stations. *See Wright v. Chief of Transit Police*, 558 F.2d 67, 68-69 & n.1 (2d Cir. 1977).

Faced with this overwhelming adverse case authority, the Port Authority argues that these decisions misapply Supreme Court precedent and ignore the special nature and purpose of airport terminals. *Citing Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985), the Port Authority

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(Continued from previous page)

1283 (existence of city regulation protecting expressive activity in airport); *U.S. Southwest Africa*, 708 F.2d at 765 (FAA regulations). These additional factors, however, were not crucial to these courts' decisions.

suggests that the Supreme Court has strictly limited public-forum status to two categories, neither of which is applicable here. According to defendant, the High Court recognizes only "designated" public fora, which include only those places that the government intentionally opens as a forum for public discourse, *see Cornelius*, 473 U.S. at 802, and "traditional" public fora, which are narrowly defined to include only those places that have traditionally been devoted to assembly and debate. In the Port Authority's view, airport terminals cannot be considered public fora because the Authority has not deliberately invited their use for public expression and because they have no tradition of assembly and debate.

The Port Authority's reading of the Supreme Court's forum analysis is unduly restrictive. The *Perry* Court, in describing these two categories, did not suggest that they are the only types of locales that can be deemed public fora. Rather, the Court in *Perry* simply identified two types of sites whose public-forum status is certain and then indicated that for sites not coming within these two groups, the court must conduct a case-by-case inquiry into the nature and function of the site to determine whether or not it can properly be characterized as a public forum. *See* 460 U.S. at 47-48. *See also Cornelius*, 473 U.S. at 804-06[4]; *Wolin*, 392 F.2d at 88-90; *Fernandes*, 663

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[4] Although *Cornelius* did appear to read the *Perry* formulation narrowly, this discussion came in the context of an analysis of an assertedly designated public forum rather than an analogy to a traditional public forum. In any event, *Cornelius*, like *Perry*, did not state or suggest that designated and traditional public fora were the only possible types, and its subsequent factual analysis indicated quite the contrary. *See* 473 U.S. at 804-06.

F.2d at 626-27. Thus, although *Perry* did represent an attempt at clarification of existing public-forum analysis, it did not limit public fora to the two narrow categories that it identified. If anything, *Perry* underscored the importance of an *ad hoc* factual analysis in determining the status of a given site.

Similarly, contrary to the Port Authority's suggestion (Memorandum in Opposition at 32), Supreme Court forum analysis does not require that a site have public communication as its purpose in order to be considered a public forum. While such a purpose is certainly a relevant consideration, it is not a requirement. Indeed, as the Court recently made clear, even narrow residential streets that have never in fact been held open for public communication are unquestionably public fora because, regardless of their particular characteristics, all public streets are deemed to be held in trust for the use of the public. *Frisby v. Schultz*, 108 S. Ct. 2495, 2500 (1988).

The Port Authority faults the plaintiffs, and the cases on which they rely, for classifying airport terminals as public fora "merely because access to the terminals is unrestricted and the terminals would be useful to plaintiffs as a site for leafletting and soliciting of funds." (Memorandum in Opposition at 27.) Citing *United States v. Albertini*, 472 U.S. 675 (1985), *Greer v. Spock*, 424 U.S. 828 (1976), *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), the Port Authority argues that "under applicable Supreme Court precedent, it is clear that neither open access nor usefulness as a site of communication render a site a public forum." (*Id.*) This statement is true as far as it goes. However, although a

site need not automatically be defined as a public forum just because it is either open to the public or useful for communication, the cited cases certainly did not eliminate these factors as important considerations.[5]

Accordingly, the Port Authority is off-base in insisting that the cases relied on by plaintiffs have misapplied Supreme Court precedent, because Supreme Court precedent has basically left the question open. No hard-and-fast requirements have been imposed, and nothing the Court has said precludes airport terminals from being classified as public fora.

In deciding whether a particular place is a public forum, courts generally consider its character and function to determine whether it is more akin to a private place with "government property interests essentially mirroring analogous private interests" or a public place "clearly held in trust, either by tradition or recent convention, for the use of citizens at large." *Members of City Council*, 466 U.S. at 815 n.32. *See, e.g., Wolin*, 392 F.2d at 88-89; *U.S. Southwest Africa*, 708 F.2d at 763-64. As the plaintiffs note, those areas found not to be public fora by

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[5] Moreover, these cases are readily distinguishable from the instant case. *Albertini* and *Greer* both involved military bases which, although open to the public, were special enclaves not subject to ordinary civilian rules. Their controlled environment and specialized program make them wholly dissimilar to the airport terminals at issue here. *Vincent* and *Greenburgh* involved utility poles and household mailboxes, respectively. Although these items might be useful as instruments of communication, the Court found them inappropriate for use as a public forum. Utility poles and mailboxes, of course, bear no resemblance to the open concourses of airports.

the Supreme Court are, "for the most part, physical or metaphysical 'places' that are constructed and used for very narrow purposes and are not open to the public." (Plaintiffs' Reply to Opposition at 6-7 (citing numerous cases).) In contrast, government-owned property that is fully available to the general public is almost always found to have public-forum status.[6] Thus, although the fact that an area is generally open to the public is not necessarily dispositive, it has proved to be a salient factor. *See United States v. Grace*, 461 U.S. 171, 177 (1983); *Jamison v. City of St. Louis*, 671 F. Supp. 641, 644 (E.D. Mo. 1986) (fact that an area is a public place ordinarily means it is a public forum), *aff'd in part & rev'd in part*, 828 F.2d 1280 (8th Cir. 1987); *ISKCON v. Wolke*, 453 F. Supp. at 872-73.

Conceding that the airport terminals are open to the general public at all times, the Port Authority nonetheless argues that they cannot be viewed as public fora because of their "singular purpose": "In sharp contrast to streets and parks which have the exchange of ideas as a principal purpose, airports have only one purpose, *i.e.*, to effectuate the safe, efficient and convenient movement of departing and arriving passengers to and from aircraft." (Defendant's Memorandum in Opposition at 18.) By emphasizing this point, the Port Authority seeks to invoke those Supreme Court cases (*see supra* note 5) that have denied access to certain government-owned sites because of the government's interest in protecting their limited purpose and function.

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[6] The most significant exception is open military bases. *See supra* note 5.

The Port Authority identifies several characteristics of the airport terminals that purportedly illustrate their "singular purpose" and distinguish them from traditional public fora. None, however, is persuasive.

First, the Authority says, "[s]treets and parks are financed from general tax funds. In contrast, . . . airports are financed from user fees paid by the airlines, concessionaires, air passengers and general aviation [and federal grant money]." (Memorandum in Opposition at 18, 19.) While this may be true, it has no bearing on whether the airport terminals constitute public fora. Since it is clear that the Port Authority is a government entity in control of government-owned property, the exact sources and types of funding are immaterial. At best, this information might be relevant to a state-action analysis, but that is not in issue because the Port Authority is concededly a state actor.

Second, the Port Authority describes the airports' lack of integration into the daily life of the surrounding communities. It is obvious why an airport cannot be physically located in the middle of town; this does not mean that the terminals are not public thoroughfares, nor that they are somehow divorced from daily life. In fact, the airports are part of the daily life of millions of people every year, including non-travelers. (*See* Defendant's Statement at ¶64). Certainly public-forum status cannot be made to depend on whether people walk through the site every day on their way to work.

Next, the Port Authority argues that because people in airports "tend to remain at [various] locations to complete travel-related tasks," they "constitute a captive

audience for anyone expressing his or her views within their visual or aural range." (Memorandum in Opposition at 23.) Although this may pose a logistical problem in the airline-controlled areas, where persons might have to wait on line in a confined place, it is much less likely to pose difficulties in the general-circulation areas controlled by the Port Authority. At any rate, this type of captive-audience problem does not preclude public-forum status: bus terminals and railroad stations, which suffer the same problem, are public fora anyway. Such conditions indicate only that time, place, and manner restrictions may be appropriate.

The Port Authority also makes much of the "unique pedestrian congestion problems" in the airport terminals. (*Id.*) Again, however, such problems can be addressed by reasonable time, place, and manner restrictions. Streets, bus terminals, and railroad stations are sporadically congested in much the same way as airports, but they are nonetheless public fora. As the Second Circuit noted in rejecting a similar argument, "the congestion and controversy that may attend the activity in the Terminal, while pertinent to the enactment of rules and regulations to govern the activity, cannot be invoked to support a flat prohibition." *Wolin*, 392 F.2d at 92. *See also ISKCON v. Wolke*, 453 F. Supp. at 874.

Finally, the Port Authority emphasizes the heightened security concerns faced by airports because of the "potential dangers of terrorist bombing and air piracy." (Memorandum in Opposition at 26.) However, a concern regarding weapons and hijackings, while real, does not justify a denial of first amendment rights in an area completely open to the public, and does not preclude its

denomination as a public forum. Moreover, the Port Authority offers no evidence to support the assumption that this concern is especially pressing in the Port Authority-controlled areas, as distinguished from the departure gates, which are controlled by the airlines. Finally, even if defendant had bothered to document its security concerns on this motion, they would suggest only that reasonable time, place, and manner restrictions are appropriate, not that the public thoroughfares should not be used at all for leafleting or solicitation.

In sum, the Port Authority's insistence on the "singular purpose" of the airport terminals is not well taken. Although the airports were created for the purpose of facilitating air travel, they serve many other functions as well – most notably, that of a meeting place and public thoroughfare where people may come and go as they please. As the court in *Chicago Area Military Project v. City of Chicago* noted in response to a similar argument by the government there, "the fact is that great numbers of people are freely admitted to the public areas of the terminal buildings not only in connection with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity." 508 F.2d at 925. Similarly, in *Fernandes v. Limmer*, 465 F. Supp. 493, 501 n.4 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. Unit A Dec. 1981), the court stated:

> True, the principal purpose of the airport is to move people from one place to another via airplane; but the court must look beyond "principal" purposes to determine whether or not an area is a "public" forum. "Streets" are primarily designed to assist the movement of traffic and

people, but they are proper First Amendment forums.

In seeking to avoid this conclusion, the Port Authority cites the decision of the Third Circuit in *ISKCON v. New Jersey Sports & Exposition Authority*, 691 F.2d 155 (3d Cir. 1982). The court there held that the Meadowlands Sports Complex is not a public forum even though it is a government-controlled site open to the public and useful for communicative activity. The court viewed the Meadowlands Complex as very different from traditional public fora because it was designed by the state to be solely a revenue-earning enterprise. Accordingly, the court concluded that the plaintiffs' soliciting activity in the sports complex would be in direct conflict with the primary function of the complex, which was to earn money for the state via the concession stands and betting activity. *Id.* at 161-62.

Defendant's reliance on *Sports Authority* is misplaced. First, the case is plainly distinguishable. The Meadowlands complex is a purely commercial establishment consisting of discrete sporting arenas surrounded by seating facilities and a few concession stands. It is open only at certain times, to paying guests, for specific events. It is not a transportation facility and it is not filled with a variety of stores, restaurants, newsstands, and other businesses.

Second, the *Sports Authority* decision is of doubtful precedential weight even in the Third Circuit, for half of the active circuit members voted to grant rehearing *en banc*. *See* 691 F.2d at 163. Indeed, three judges specifically faulted the panel opinion as sweeping too broadly and

relying too heavily on traditional formal notions of fora. *See id.*

Third, to the extent that the decision reflects a rigid formulation of the public-forum analysis, it is inconsistent with Second Circuit precedent, which requires a case-by-case analysis, focusing primarily on whether expressive activity is appropriate for the site in question. For example, in *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2d Cir. 1984), the court declared that

> [p]ublic property . . . which is neither a traditional nor a designated public forum, can still serve as a forum for First Amendment expression if the expression is appropriate for the property, *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1054 (2d Cir. 1983) (*ECCAG*), and is not "incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 . . . (1972).

See also Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319, 1323-24 (2d Cir. 1974); *Wolin*, 392 F.2d at 89 ("[D]oes the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views. . . . "). This approach is completely consistent with Supreme Court precedent, which, as noted, undertakes a factual analysis to determine the appropriateness of the proposed activity for the site in question.

The Port Authority also relies on *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986), which concluded that a municipal stadium was not a public forum because

it was not held open to the general public and was specifically reserved for use by civic and charitable organizations. The court essentially determined that the plaintiff's proposed activity, a profit-making rock concert, was incompatible with the primary purpose of the site. *See id.* at 83-84.

This decision is of no assistance to the Port Authority because of the crucial differences between the stadium and the airport passenger terminals. Indeed, the analysis in that case is entirely consistent with the conclusion that the terminals do constitute public fora since they are fully open to the public and their primary purpose has not been shown to be incompatible with regulated expressive activity of the type at issue here.

The record in this case fails to raise any question about the appropriateness of leafleting and solicitation in the terminals. There is no fundamental incompatibility between plaintiffs' *sankirtan* activity and the ordinary goings-on in an airport terminal. To the contrary, the large, open terminals, which are filled with people walking, talking, shopping, and just passing time, are plainly appropriate places for such expressive activity. "[T]he concourse of a large airport facility . . . has the character, pattern of activity, and nature of purpose that make it an appropriate place for the communication of views." *Jamison,* 828 F.2d at 1283.

Moreover, the interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors "lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general

public coming and going as they please." *Id.* Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

On the whole, then, it seems "clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases." *U.S. Southwest Africa,* 708 F.2d at 764. None of the Port Authority's proffered arguments can defeat the "clear and powerful" analogy, *Fernandes,* 663 F.2d at 627, between traditional public fora and the open areas of these airport terminals.

CONCLUSION

In view of the foregoing, the unavoidable conclusion is that there are no genuine disputes of material fact, Fed. R. Civ. P. 56 (c), and the undisputed factual record demonstrates that the public thoroughfares within the terminals that are controlled directly by the Port Authority must be classified as public fora. It is equally clear on the current record that there are no compelling reasons that would justify a total prohibition against leafleting and solicitation within these areas and that defendant's policy to the contrary contravenes plaintiffs' rights under the first amendment.

For the reasons noted, I recommend that plaintiffs' motion for summary judgment be granted. Specifically,

they are entitled to a declaration that the general circulation areas of the passenger terminals directly controlled by the Port Authority at the JFK International, LaGuardia, and Newark International Airports are public fora, and that a total prohibition against leafleting and solicitation within these buildings is inconsistent with the requirements of the first amendment. This conclusion is of course without prejudice to the right of the Port Authority to impose reasonable time, place, and manner restrictions.

Pursuant to Rule 7 of the Rules of Proceedings Before A U.S. Magistrate, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Mary Johnson Lowe, Room 803, and to the chambers of the undersigned, Room 503. Failure to file timely objections may constitute a waiver of those objections. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988).

DATED: New York, New York
October 25, 1988

RESPECTFULLY SUBMITTED,

/s/ Michael H. Dolinger
Michael H. Dolinger
United States Magistrate

Copies of the foregoing Report and Recommendation have been mailed this date to:

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APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1990

Docket No. 89-9182

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and ninety-one.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and JOHN WINSLOW, on behalf of themselves and all International Society for Krishna Consciousness members,

Plaintiff-Appellees,

– v. –

WALTER LEE, Superintendent of Port Authority Police,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees International Society for Krishna Consciousness, Inc., et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing en banc having been transmitted to judges of the Court in regular active service and to any other judge that heard the appeal and a poll of said judges having been taken, a majority of the Court has voted not to reconsider the decision in banc. Chief Judge Oakes dissents from the denial of the rehearing in banc in a separate opinion, in which Judges Newman and Cardamone concur.

OAKES, *Chief Judge*, with whom NEWMAN and CARDAMONE, *Circuit Judges* join, dissenting from denial of rehearing en banc:

I dissent from the denial of rehearing en banc for three reasons. First, rehearing is necessary to avoid a clear-cut conflict among the circuits, created by the panel's decision, as to whether airport terminals are traditional public fora. *Compare International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576 (2d Cir. 1991) (finding that terminals are not traditional public fora) *with Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987) (finding that terminals are traditional public fora), *cert denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791 (9th Cir. 1986) (same), *aff'd on other grounds*, 482 U.S. 569 (1987). *See also United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) (finding that terminals are generic public fora, without distinguishing between

the "traditional" or "designated" categories); *Fernandes v. Limmer,* 663 F.2d 619 (5th Cir. Unit A. Dec. 1981) (same); *Chicago Area Military Project v. City of Chicago,* 508 F.2d 921 (7th Cir.) (same), *cert. denied,* 421 U.S. 992 (1975).

Second, rehearing is necessary to clarify our circuit's understanding of *United States v. Kokinda,* 110 S. Ct. 3115 (1990) (plurality decision), which the panel claims has "altered public fora analysis." *Lee,* 925 F.2d at 580. Given that only a plurality of the justices in *Kokinda* decided that the post office sidewalk there was not a traditional public forum, and did so without exclusive reliance on the sidewalk's purpose, *see Lee,* 925 F.2d at 584 (Oakes, *C.J.,* dissenting), as well as the fact that an airport terminal is wholly different from a post office sidewalk, *see id.* at 584-87, I believe that the panel's reading of *Kokinda* will, at a minimum, constitute bad law for our circuit and, at most, have extremely deleterious consequences for future public fora jurisprudence.

Third, I would grant rehearing to reconcile the panel's conclusion that a forum's purpose alone can determine its public or non-public status, *see Lee,* 925 F.2d at 581-82, with our circuit's longstanding doctrine that the status of a forum is determined by a complex balancing of competing factors, none of which alone is dispositive. *See Wolin v. Port of New York Auth.,* 392 F.2d 83, 89 (2d Cir.), *cert. denied,* 393 U.S. 940 (1968) (holding that a forum's status is determined by whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance").

I should suppose that rehearing en banc could be denied here on the basis that the Supreme Court is sure to grant certiorari. That, it strikes me, is not sound justification; better that our house be put in order without Supreme Court intervention.

APPENDIX E

(Operations – 2/11/88)

Kennedy International, Newark International, and LaGuardia Airports Revision to Chapter III of Airport Rules and Regulations Addition of Regulations for Non-Commercial Activity Prohibitin [sic] of Vending Machines

Currently, the conduct of individuals and organizations at all three airports are subject to the Airport Rules and Regulations. Chapter III, entitled "Commercial Activity," generally prohibits commercial activity at the airports without Port Authority consent, and prohibits specific commercial activity at the airports such as the distribution of literature, the posting of signs and the playing of musical instruments, without permission.

A recurring problem at the airports is the practice of groups and individuals using the airports as sites of organized conduct that is inconsistent with the intended purpose of the airports – the facilitation of air travel. Since these groups engage in such behavior for non-commercial purposes, such as religious observance and communication of political messages, their conduct is not regulated by the current version of Chapter III, which concerns commercial activity. Members of the International Society for Krishna Consciousness, Inc., which brought a lawsuit in Federal Court in New York in 1975 seeking access to the airports to distribute publications, solicit money and engage in related activity, currently engage in such conduct pursuant to a very limited permission granted to the organization pending the determination of the lawsuit, which is continuing.

Staff has proposed the adoption of regulations to regulate the non-commercial distribution of literature and related activity in interior public non-tenant areas of the airports. These regulations would be made Part B of Chapter III. The current regulations concerning commercial activity, as amended, would be designated Part A.

The proposed Part B prohibits conduct in interior public non-tenant areas that creates the most serious problems of congestion and pedestrian annoyance Part B prohibits leafleting, the solicitation of money and the sales of merchandise. Other non-commercial activity is prohibited to the extent that it interferes with airport operations.

The proposed Part A of Chapter III includes a provision prohibiting the installation of vending machines that sell goods in public non-tenant areas at the airports. Restroom vending machines selling personal hygiene items will not be prohibited because they satisfy passenger emergency needs.

The Port Authority has permitted vending machines to be installed in its space at the airports as a method of selling goods, but vending machines have been a disfavored method of distribution because their presence creates security, safety, congestion, aesthetics, maintenance and customer complaint problems. Over the past year, USA Today has made persistent requests to permit the installation of numerous newspaper vending machines in both Port Authority and airlines space at the airports, and has recently commenced an action in Federal Court in New Jersey to compel the Port Authority to

permit the installation of newsracks at Newark International Airport. In the course of considering USA Today's requests, staff has determined that a proliferation of such vending machines would have the adverse results of the nature described above. In the course of these deliberations, staff has determined that a uniform policy prohibiting the sale of goods by vending machines in public non-tenant areas would eliminate the undesirable effects of such vending machines in public Port Authority space at the airports. Aviation staff will consult with the airlines as to the feasibility of eliminating the sale of goods by vending machines in public areas occupied by tenants. Staff shall take all steps necessary to insure that all goods and services, including newspapers and magazines, for which there is public demand, are conveniently available to airport patrons.

Whereupon, the following resolution was unanimously adopted by the Committee:

RESOLVED, that Chapter III of the Airport Rules and Regulation is repealed and replaced by the following:

CHAPTER III

COMMERCIAL AND NON-COMMERCIAL ACTIVITY

A. Commercial activity at Port Authority air terminals is subject to the following conditions and restrictions:

1. Any permission granted by the Port Authority directly or indirectly, expressly or by implication, to any person or persons, to enter upon or use any air terminal or any part thereof (including aircraft operators, crew members and

passengers, spectators, sightseers, pleasure and commercial vehicles, officers and employees of airlines, lessees and other persons occupying space at such air terminal, persons doing business with the Port Authority, its lessees, sublessees and permittees, and all other persons whatsoever whether or not of the type indicated), is conditioned upon compliance with the Port Authority rules and regulations: and entry upon or into any air terminal by any person shall be deemed to constitute an agreement by such person to comply with said rules and regulations. As used herein, compliance with Port Authority rules and regulations includes compliance with the Port Authority master security plan for the air terminal and the submittal by certified air carriers of their security programs as required by Parts 121 and 129 of the Federal Air Regulations.

2. No person shall carry on any commercial activity at any air terminal without the consent of the Port Authority.

3. No vending machines for the sale of goods shall be permitted in the public areas of Kennedy International, Newark International and LaGuardia Airports which are not occupied by a lessee, licensee or permittee. This prohibition shall not apply to vending machines in restrooms selling personal hygiene items.

4. No person shall conduct sightseeing flights at any air terminal except under permit from the Port Authority. By sightseeing flights is meant flights on which passengers are carried for hire, and which originate and terminate at the same terminal with no intermediate stops other than emergency stops.

5. No person shall use any area of an air terminal for storage of cargo or other property without permission. If, notwithstanding the

above prohibition, a person uses such areas for storage as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the cargo or other property removed or to cause the same to be removed and stored at the expense of the owner or consignee thereof, without liability for damage thereto arising from or out of such removal or storage.

6. Unless otherwise provided in a lease or other agreement, no person shall use any area of an air terminal (other than the public aircraft parking and storage areas), for parking and storage of aircraft without permission of the Manager. If, notwithstanding the above prohibition, a person uses such areas for parking or storage as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the aircraft removed or to cause the same to be removed and stored at the expense of the owner thereof, without liability for damage thereto arising from or out of such removal or storage.

7. No person shall use or occupy an operational area for any commercial purpose whatsoever except a purpose pertaining to the servicing of tenants, concessionaires, airlines, activities associated with airlines, or governmental agencies, or a purpose connected with maintenance and operation of an air terminal. Persons so authorized must carry and/or display personal identification of the type and in the manner specified by the Manager.

8. No person shall land or take off an aircraft on or from a public landing area, or use a public landing area, public ramp and apron area, public passenger ramp and apron area, public cargo ramp and apron area, or a public aircraft parking and storage area, except upon

the payment of such fees and charges as may from time to time be prescribed or agreed to by the Port Authority.

9. All charges due to the Port Authority for the use of air terminals shall be payable in cash unless credit arrangements satisfactory to the Port Authority have been made in advance or permission has been secured for payment by check.

10. No person shall post, distribute or display at an air terminal a sign, advertisement, circular, or any printed or written matter concerning or referring to commercial activity, except pursuant to a written agreement with the Port Authority specifying the time, place and manner of, and fee or rental for, such activity.

11. No person shall solicit funds for any commercial purpose at an air terminal without permission.

12. No person, unless duly authorized by the Port Authority, shall, in or upon any area, platform, stairway, station, waiting room or any other appurtenance of an air terminal:

(a) sell, or offer for sale, any article of merchandise; or

(b) solicit any business or trade, including the carrying of baggage for hire and the shining of shoes or bootblacking; or

(c) entertain any persons by singing, dancing, mime, acting, juggling or playing any musical instrument.

B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:

1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

(a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.

(b) The sale of distribution of flyers, brochures, pamphlets, books or any other printed or written material.

(c) The solicitation and receipt of funds.

(d) The sale of any service.

(e) The sale of any raffle ticket or entry in a game of chance.

(f) The conduct of a game of chance.

2. The following conduct is prohibited at an air terminal:

(a) The intentional touching of any person without his or her consent.

(b) The performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity which constitutes a danger to persons or property, or which interferes with the orderly formation and progression of waiting lines, or which interferes with any of the following: pedestrian and/or vehicular travel; the issuance of tickets or boarding passes or equivalent documents for air or ground transportation; luggage or cargo movement or handling; the entry to and exit from vehicles; security procedures; government inspection procedures; cleaning, maintenance, repair or construction operations.

(c) The intentional leaving of any item intended for distribution unattended.

(d) The attachment of any placard, sign, circular or other written material, on any wall, post, counter, billboard or any other surface.

(e) The erection of any table, chair, mechanical device or other structure.